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October 24, 2014

Marlene Dortch, Esq., Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

RE: Notice of *Ex Parte* Communication, GN Docket No. 14-28 (Open Internet); GN Docket No. 09-191 (Preserving the Open Internet); WC Docket No. 07-52 (Broadband Industry Practices); DA 14-1365 (Tell City Waiver Decision); Docket No. 06-2943 (Designated Entity); WT Docket No. 05-211 (Designated Entity); AU Docket No. 06-30 (Designated Entity); WC Docket No. 13-184 (Modernizing the E-rate Program for Schools and Libraries)

Dear Ms. Dortch:

This letter reports on two meetings held at the Federal Communications Commission with representatives of the Minority Media and Telecommunications Council. The first was with FCC Commissioner Jessica Rosenworcel and Clint Odom, Policy Director on October 22, 2014. In this meeting Kim Keenan, President and CEO, David Honig, President Emeritus and General Counsel, Maurita Coley, Vice President and Chief Operating Officer and Maria Lesinski, Law Clerk, represented MMTC.

The second meeting was with FCC Commissioner Ajit Pai, and Matthew Berry, Chief of Staff on October 24, 2014. In this meeting Kim Keenan, President and CEO, David Honig, President Emeritus and General Counsel, Maurita Coley, Vice President and Chief Operating Officer, Nicol Turner-Lee, Vice President and Chief Research and Policy Officer, and Charlyn Stanberry, Cathy Hughes Fellow, represented MMTC.

With respect to the Open Internet proceeding, MMTC continues to support Section 706 as a rational regulatory framework along with the strong improvements to the consumer complaint process, proposed in MMTC's Comments.[1] MMTC urged the Commission to

[1] *See* Comments of the National Minority Organizations, GN Docket Nos. 14-28, 10-127 (July 18, 2014), at p. 13.

model its enforcement of open Internet violations after the consumer-friendly complaint process established by Title VII of the 1964 Civil Rights Act. Instead of relying on an overly formal complaint process, such as that authorized for Title II services by Section 208,[2] an enforcement program derived from the Title VII example would allow a complainant to provide the Commission's Enforcement Bureau staff with enough information to make out a *prima facie* case of specific or systemic harm. This would allow the Commission to conduct an initial screening; and, if the Commission's staff issues a non-precedential finding of probable cause, the agency could institute expedited enforcement or mediation.[3] This efficient model of enforcement would provide consumers and regulators with an affordable and expedited means of investigating alleged rule violations and other claims against service providers.[4] Implementing the Title VII model could also provide consumers with timely and cost-effective complaint resolution.

MMTC is concerned about the extremely low-levels of people in color employed in the high tech industries.[5] To study and provide recommendations on how to overcome the dearth of employment diversity in high tech, MMTC recommended that the Commission assign its Advisory Committee for Diversity in the Digital Age ("Diversity Committee") the task of researching the employment patterns and practices that result in a homogeneous technology sector. This task is well within the scope of the Diversity Committee's Charter.[6]

MMTC applauded the recent release of the Notice of Proposed Rulemaking on Competitive Bidding, to reinvigorate the Designated Entity (DE) Rules.[7] MMTC looks

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[2] *See* 47 U.S.C. §208 (Section 208 directs complainants to submit a petition to the Commission, the Commission then forwards the complaint to the common carrier for response, the Commission may then open an investigation).

[3] *See* Comments of the National Minority Organizations, at 14.

[4] Comments of the National Minority Organizations, at 12-14 (July 18, 2014).

[5] *RE: Diversity and EEO in the Tech Sector,* (September 16, 2014) available at http://mmtconline.org/wp-content/uploads/2014/09/MMTC-Tech-EEO-Ltr-091614.pdf (last visited October 23, 2014).

[6] *See* Federal Communications Commission, Charter of the FCC's Advisory Committee on Diversity for Communications in the Digital Age (2011), *available at* http://transition.fcc.gov/DiversityFAC/docs/charter-2011.pdf (last visited Oct. 24, 2014) ("The Committee's mission is to provide recommendations to the FCC regarding policies and practices that will further enhance diverse participation in the telecommunications and *related* industries." (emphasis added)).

[7] *See In the Matter of Updating Part I Competitive Bidding Rules,* Notice of Proposed Rulemaking, RM-11395, (2014) availble at http://www.fcc.gov/document/competitive-bidding-nprm (last visited October 22, 2014). *See also MMTC Expresses Strong Support For FCC Actions to Reduce Market Entry Barriers That Impede Designated Entity Participation in Spectrum Auctions,* Press Release (2014), availible at

forward to participating and anticipates that the Commission will complete this proceeding efficiently to ensure DEs have time to finalize their business plans and raise the necessary capital for participation, as mandated by Congress, prior to the incentive auction.

As noted in MMTC's application for review of the Media Bureau's denial of the Tell City FM translator relocation waiver request,[8] the Tell City waiver request addresses an important agency policy decision for AM broadcasters; especially the minority owners, who disproportionately hold AM licenses and require urgent relief.[9] As a result of the Tell City waiver denial, the FCC effectively elevates outdated procedures over the public interest. The Tell City waiver request is the only immediately implementable AM revitalization solution that would allow a widespread benefit. The application requested a removal of FCC regulatory barriers to AM stations acquiring and moving existing FM translators, which would benefit minority ownership, AM revitalization, and the listening public.

MMTC inquired about the status of the FCC's Diversity Committee whose mission is to advise the Commission regarding policies and practices that will enhance diversity in the telecommunications and related industries.[10] MMTC expressed concern that the Diversity Committee has not been re-chartered since the last it was last instituted on

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http://mmtconline.org/wp-content/uploads/2014/10/MMTC-DE-NPRM-Statement-101014.pdf (last visited October 22, 2014).

[8] *RE: Suggestion to Reverse the Tell City Waiver Decision (DA 14-1365) on the Commission's Own Motion,* September 29, 2014), available at http://mmtconline.org/wp-content/uploads/2014/10/MMTC-Tell-City-Cm-092914.pdf (last visited October 23, 2014).

[9] The survival of minority ownership in broadcasting is closely linked to the ability of AM radio to thrive because over two-thirds of minority owned broadcast stations are on the AM band. In 2011, the last year for which the FCC released data, of the 559 broadcast stations (AM/FM/TV) held by minorities, 409, or almost 73 percent, of them were AM stations. *See Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report on Ownership of Commercial Broadcast Stations*, 27 FCC Rcd 13814, 13824 (rel. Nov.14, 2012). Minority ownership in AM radio is far higher than in any other FCC-licensed technology. Further, minority owned AM stations tend to have inferior technical facilities (higher frequencies, daytime-only authorizations, complex directional patterns, lower wattages, geographic separation from the central city) and thus especially need FM translators in order to survive and compete.

[10] *Diversity Committee Meeting*, (October, 2012) availble at http://www.fcc.gov/events/diversity-committee-meeting-1 (last visited October 22, 2014).

March 11, 2013.[11] MMTC supports the existence of the Diversity Committee as a strong community voice, made up of subject matter experts, which perpetuates a conversation on diversity engagement.

As a final matter, as expressed to Commissioner Pai, MMTC also continues to support E-Rate reform.

Respectfully submitted,

Kim Keenan

Kim Keenan
President

[11] *Appointment of Members to the Re-Chartered FCC Diversity Committee*, Public Notice, (March, 2013), available at http://www.fcc.gov/document/appointments-members-re-chartered-fcc-diversity-committee (last visited October 22, 2014).

Attached are all documents distributed in the meeting.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re: Matter of	)	
	)	
WAY Media, Inc.	)	Facility ID No. 141101
W218CR, Central City, KY	)	
For a Minor Change	)	BPFT-20121116ALE

To: The Office of the Secretary
Attn: The Commission

APPLICATION FOR REVIEW

WAY Media, Inc, ("WAY") and the Minority Media and Telecommunications Council ("MMTC"), pursuant to § 1.115 of the Commission's rules, hereby respectfully apply for review of the September 19, 2014 letter decision, DA-1365 (the "Letter") of the Chief, Audio Division, Media Bureau (the "Bureau") that denied the captioned application. [1]

As demonstrated herein, the Letter contains an erroneous finding as to an important and material question of fact (namely, satisfaction of the relevant waiver criteria) and involves a question of policy that has not previously been resolved by the Commission (the efficacy of waivers to enable AM stations to remedy listeners' reception problems by moving available FM translators to within their service areas).

[1] WAY filed the subject application and thus clearly was aggrieved by the action taken in the Letter of which review is being sought herein. We further note that consummation of an application to assign the subject facility's license from WAY to Hancock Communications, Inc. ("Hancock") (BALFT-20121116AKR) continues to be frustrated, as grant of the subject application is a condition of closing. On February 12 and 16, 2013 MMTC filed comments that were included in an amendment to the subject application and thereby previously participated in this proceeding. In its comments, MMTC noted that about two-thirds of minority-owned broadcast stations, of which it is a foremost advocate, are AM stations, that the survival of that medium is of critical concern to it and its members, and that the relief represented by the subject application would materially advance that goal. Although the Letter (at pp. 3 and 5) referenced the desirability of the subject waiver for constituencies such as MMTC's, relief was not granted.

Background – The intent of the subject waiver is to enable FM Translator Station W218CR, Central City, Kentucky (the "Translator") to serve as a fill-in translator for AM Station WTCJ, Tell City, Indiana ("WTCJ"). [2] The specific waivers sought are to treat the proposed site move as a minor change notwithstanding geographic and channel changes in excess of the limitations of § 74.1233(a)(1) of the FCC rules. The waiver request was supported by statements from 16 organizations and dignitaries, including MMTC, numerous AM station licensees describing comparable existential hardships, and a legal memorandum presented by the National Association of Broadcasters to allay concern over potential *Ashbacker* issues.

WTCJ operates on 1230 kHz with only 850 watts on a local Class C channel with nighttime service greatly restricted by interference. [3] WTCJ has served its community of license since 1948 [4] and is the only broadcast station licensed to serve Tell City, [5] which has a current population of 7,292 and 476 firms. [6] The waiver request stated that WTCJ's viability had become threatened through impaired reception and a consequent precipitous loss of revenue, that its use of the Translator would enable it to provide reliable, full-time service to area residents and businesses and to increase local programming, services and listener involvement, and that loss of this unique local information source clearly would not serve the public interest. [7]

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[2] We note that an affiliate of Hancock has begun operating W227CO, Cannelton, IL as a translator of WTCJ. It obtained W277CO through the 2003 translator filing window after nearly 11 years' delay. W227CO is located approximately 11.3 miles distant from W218CR and will serve a substantially different area.

[3] *See* BPFT-20121116ALE, "AM Revitalization Public Interest Reasons In Favor of WTCJ(AM) Waiver Request," Statement of Bayard H. Walters, President of Hancock, at 1. Hancock is the proposed assignee of the Translator and the licensee of WTCJ, its proposed primary station.

[4] *Id.*, at 3.

[5] FCC CDBS Database, viewed October 9, 2014, official notice requested.

[6] United States Census Bureau, State and County Quickfacts, Tell City, Indiana (http://quickfacts.census.gov/qfd/states/18/1875248.html) (last accessed Oct. 17, 2014), official notice requested.

[7] BPFT-20121116ALE, "AM Revitalization Public Interest Reasons In Favor of WTCJ(AM) Waiver Request," Statement of Bayard H. Walters, at 2-3.

The Letter contended that the standards for a waiver had not been met, that its benefits would be widely applicable to the AM industry, that potentially competing applicants would be unfairly foreclosed, and that the matter should be deferred to on-going rulemaking to explore avenues for eventually revitalizing AM broadcasting.

Questions presented:

In denying the waiver, did the Bureau overlook the special circumstances clearly presented in the application and the numerous supporting statements it contained?

Does the extreme, ongoing delay in fashioning rulemaking relief for the AM service, the desperate need for which the Commission has repeatedly acknowledged, compel resort to this and comparable waivers in order to enable that essential service to survive?

Discussion – As the Letter correctly states, waiver requests must be supported by two showings: that (1) special circumstances warrant a deviation from the general rule; and (2) such deviation better serves the public interest. [8] However, contrary to the Letter's conclusion, the subject application manifestly met both prongs of the required showing.

The supporting documentation in the record of this proceeding amply demonstrated that AM stations are increasingly precluded by interference from reaching their audiences, that consequently their very existence is threatened, and that enabling FM translators to move to serve as fill-in translators is the only practical solution to this dire problem. Specifically:

- AM stations required to severely cut back power at night need FM translators to provide reliable full-time emergency and other essential information. [9]

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[8] Letter at 2 and n. 17, *citing NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008) and *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[9] *See, e.g.*, Statement of WESR AM/FM, January 16, 2013 ("The ability to acquire a FM translator for my AM station would greatly increase the ability of WESR AM to serve the community in times of emergency and provide valuable public service announcements, emergency weather and urgent local news during the overnight hours. Recently during Sandy, WESR AM was forced to operate on 50 watts due to nighttime restrictions reducing the number of people covered by our signal by 90%."); Statement of Metroplex Communications, Inc., January 18, 2013 ("The need to reduce power at night eliminates the availability of our signal to a large portion of the residents who depend upon us."); Statement of Payne 5 Communications, LLC, January 17, 2013 ("most AM stations either go off at dusk or have such reduced broadcasting capabilities that the public is not well served at all"); Statement of Simmons Multimedia dated January 17, 2013 ("Due to the increased noise floor both of the stations [located along

- Nearby translators are scarce and command artificially inflated prices that most local AM stations cannot afford. [10]
- Translators have already proven to be a successful solution. [11]
- Immediate relief is needed prior to implementation of ultimate long-term solutions, the feasibility of which is far from certain. [12]

The Letter made no mention of any of this record evidence, which clearly constituted a special circumstance that mandated deviation from the present rule as the only viable means of obtaining the essential relief being sought. In that regard, we note that the Commission has previously found that merely preserving the competitive balance in a relatively large market rose to the level of "special circumstances" meriting waiver of its otherwise absolute prohibition against certain joint sales agreements. [13] Surely the viability of the sole station serving a sizeable community is even more compelling. Indeed, it is a bedrock principle that the potential demise

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the US/Canadian border in North Dakota] now struggle to serve their communities, particularly at night. ... [A]t night ... we often hear negative comments from listeners and advertisers in regards to the 'poor signal quality' of our local high school sports broadcasts which is a direct result of noise generated by everything from overhead power lines to dimmer switches, computers, etc., etc.").

[10] *See, e.g.*, Statement of MMTC, February 12, 2013 ("the Commission's Section 74.1233(a)(1) regulation that restricts FM translator moves based on a minimal miles radius calculation ... has resulted in it being almost impossible for many stations ... to find an FM translator available for acquisition."); Statement of Metroplex Communications, Inc,, January 18, 2013 ("Ever since the Commission authorized AM on FM translators, I have worked diligently to acquire an FM translator so as to make our community-centric programming more widely available. However, the fact that WBGZ is located within a major market metro (St. Louis), the regulations regarding the movement and frequency migration of any available translators have thwarted my efforts."); Statement of SESAC, April 3, 2013 ("While AM broadcasting on FM translators has proved to be transformative for operators and the communities they serve, we have learned that the availability of FM translators is in fact quite limited, based on the minimal miles radius restriction in Section 74.1233(a)(1) of the Commission's rules.").

[11] *See, e.g.*, Statement of Miller Media Group, November 28, 2012 ("As a licensee of 3 AM radio stations, all of which are simulcast on FM translators we've been blessed to acquire and use, I can personally attest to the importance of continuing to provide local radio service that's been heard for decades on my AM stations, by having the same programming simulcast on FM translators that are not susceptible to man-made interference as the AM signal.").

[12] *See, e.g.*, Statement of MMTC, February 12, 2013 ("Even if the Commission allowed AM stations to increase their power, that change would not only be cost prohibitive for most AM station owners, but it would still not be enough to address noise interference issues. Moreover, although MMTC has long championed moving AM to Channels 5 and 6, we recognize the difficulty of that occurring in a time frame that would be relevant to WTCJ's present application.").

[13] *David D. Oxenford, Esq. (KEGK(FM), Wahpeton, ND)*, 21 FCC Rcd 9805 (Media Bureau, 2006).

of a community's only local station severely disserves the public interest. [14]

It cannot possibly be doubted that the relief requested by WAY and MMTC will serve the public interest better than threatening the survival of stations like WTCJ and thereby depriving Tell City and comparable communities of their only local media outlet. Yet the subject situation is hardly unique. Even aside from considerations of localism, the loss will be felt most heavily by minority and diverse audiences who rely upon AM stations and have few or no alternative sources of crucial information.[15] Indeed, the Commission prefaced its pending examination of methods to bolster the AM service with a compelling overview of the essential nature of AM, the crucial need to ensure its survival and the severe challenges that must be overcome. [16]

The Letter further faults the requested waiver on the ground that it would have applicability to parties beyond WTCJ and would become a boon to the AM industry. [17] Yet, the prospect that a waiver will be beneficial to many – *i.e.*, that it will serve the greater public interest – is hardly a flaw at all, much less a fatal one. Indeed, there is ample precedent for favorable consideration of waivers of equally wide potential scope. Thus over the course of nearly two decades the so-called "Arizona waiver" relieved hundreds of stations from the core

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[14] *See, e.g., Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, 26 FCC Rcd 2556 (2011) at ¶ 39 (loss of a ***second*** local service in communities of 7,500+ population to be strongly disfavored when assessing public interest of proposed community changes).

[15] *See* Statement of MMTC, dated February 12, 2013 ("Presently, around two-thirds of minority-owned radio stations are AM stations. Thus, these regulations are even more detrimental to minority broadcasters, who typically own stations with inferior technical parameters and have a difficult time reaching their intended audience because the stations are located far from the centers of the urban markets they generally serve. By making it easier for AM stations to move to existing FM translators farther away, more stations would be able to re-broadcast their AM signals and thus increase accessibility for AM listeners in their respective areas while furthering the Commission's goals.")

[16] *Revitalization of the AM Radio Service*, Notice of Proposed Rulemaking, 28 FCC Rcd 15221 (2013) ("*AM Revitalization NPRM*"). Therein, the FCC noted that news/talk, sports, foreign language, religious and local programming formats are common on the AM band (¶ 3), that consumer migration to newer media services has been fueled by AM's technical limitations, lower fidelity, lack of advanced features, interference and restrictions upon night-time operation (¶¶ 4-7) and that further relief was needed (¶¶ 11-43).

[17] Letter at 3, first paragraph.

requirement that a majority of programming originate from a local main studio. [18] Nowadays, noncommercial educational stations continue to obtain routine waiver exemption from the main studio location requirement altogether. [19] And – most tellingly – the very set of "Mattoon waivers" that the Letter purports to distinguish from the subject request [20] are still being considered and issued, notwithstanding the pendency of rulemaking that seeks to eliminate the need to handle such cases on an *ad hoc* basis through the issuance of individualized waivers. [21] Consequently, the prospect that other similarly-situated stations might obtain much-needed relief pending reconsideration of the underlying rule cannot be a bar to grant of the subject relief.

The second ground cited by the Letter for denial of the waiver was ostensible concern with *Ashbacker*-related procedural concerns. [22] Yet the Bureau candidly recognized that its reliance upon *Ashbacker* is overly broad. As it correctly notes, *Ashbacker* held that "where two *bona fide* applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration." [23] Here, there are no competing applications, and so the only relevant question is the degree, if any, to which

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[18] *Arizona Communications Corp.*, 25 FCC 2d 837 (1970). In *Main Studio and Program Origination Rules*, 3 FCC Rcd 5024 (1988), the Commission codified a lesser standard for main studio program origination and thereby obviated the need for continuing to grant "Arizona" waivers, which it had been issuing for nearly two decades.

[19] *See, e.g., University System of New Hampshire Board of Trustees*, 27 FCC Rcd 12315 (2012). Such waivers are routinely issued notwithstanding the continuing core importance of a local main studio, *Main Studio and Program Origination Rules*, 3 FCC Rcd 5024 (1988) ¶¶ 36-38. Beginning with *Sound of Life, Inc.*, 4 FCC Rcd 8273 (1989), hundreds of such waivers have been granted over the past quarter century and no end is in sight.

[20] Letter at 3, citing *John F. Garziglia, Esq.* (W263AQ, Mattoon, IL), 26 FCC Rcd 12685 (2011). Although unpublished, waivers are being routinely issued based upon the same set of criteria that were deemed to warrant relief in that particular case (*i.e.*, waiving the requirement that a minor translator move exhibit overlap of licensed and proposed contours). *See*, for example, BPFT-20140612ABY (W254AX, Antigo, WI), granted July 24, 2014.

[21] *AM Revitalization NPRM, supra*, at ¶ 18.

[22] Letter at 3-5, citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

[23] Letter at n. 10. *See, also,* Letter at text at n. 23.

Ashbacker compels an opportunity for filing potentially competing applications. [24] As the waiver request pointed out, that opportunity is far from absolute, or else the entire distinction between "major" and "minor" changes would crumble. [25] Thus, in its 2006 Allocation Streamlining order the Commission permitted non-mutually-exclusive channel changes to be considered "minor" and thus entitled to cut-off protection upon filing where grant of the associated application was found to serve the public interest. [26] Even that was hardly a unique accommodation – in reforming the broadcast license renewal procedures Congress eliminated the decades-long right to file a competing application for a new, replacement station and instead mandated grant of a license renewal that met rudimentary public interest standards. [27]

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[24] There is ample precedent for granting relief without regard to others' rights to file hypothetical competing applications when an equivalent channel is available. *See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Leesville, Louisiana)*, 14 FCC Rcd 9011 (Allocations Branch, 1999). Here, as the waiver request noted, Tell City is not in a spectrum-limited market, and so alternative channels are available to accommodate others who might seek to establish or relocate a translator there. In that regard, the Commission has recognized that other parties' ability to proactively request their own facility changes rather than wait for an opportunity to file a mutually-exclusive application, together with the desirability of expediting the provision of enhanced broadcast service to the public, justifies a first come-first served procedure notwithstanding *Ashbacker*. *See, e.g., Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212 (2006) at ¶ 9.

[25] BPFT-20121116ALE, "AM Radio Revitalization Waiver Request" at 4. In that regard, it is significant that every minor site change application filed on a "first come-first served" basis necessarily creates a new area which then becomes protected from the filing of further applications that would be mutually-exclusive with it. Consequently, that time-honored procedure inherently conflicts with an absolute reading of *Ashbacker* as requiring notice to potentially-interested applicants and an opportunity for them to file mutually-exclusive applications. For that very reason any attempt to rely upon mutual exclusivity as a means of ensuring *Ashbacker* rights is a flawed rationale.

[26] *Id.*, at 3-4, *citing Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006).

[27] *Broadcast License Renewal Procedures*, 11 FCC Rcd 6363 (1996). A renewal must be granted so long as there have been no serious violations by the licensee of the Communications Act or the FCC rules; there have been no other violations of the Act or the rules which, taken together, would constitute a pattern of abuse; and the station has served the public interest, convenience and necessity. *Id.*, at ¶ 3, and *see* 47 U.S.C. §309(k)(1). The final showing is assumed in the absence of devastating allegations presented by opponents, with the result that for all practical purposes renewal has become automatic. Of especial relevance here, the former opportunity to file competing applications for a new station that would be mutually-exclusive with the renewal applicant has entirely disappeared; *see* 47 U.S.C. §301(d). Thus *Ashbacker* cannot possibly be read as mandating opportunities to file competing applications where the public interest dictates otherwise.

It is further significant that *Ashbacker* arose in a primordial era of communications when AM broadcasting was the only functional electronic mass medium, and so the opportunity to apply for such facilities was the only way to enter the industry and be heard. As the FCC and the courts have repeatedly recognized, the generations since then have seen an explosive evolution in mass media that has relegated AM, and, indeed, broadcasting generally, to an increasingly diminished role among a plethora of other effective media. [28] Consequently, although by default *Ashbacker* applied to the one and only viable electronic mass medium of its time, the need to extend such rights to all broadcasting facilities and markets has long since passed. [29]

The final ground upon which the Letter denied relief was that the Commission could take the matter up in its AM Revitalization rulemaking. [30] But the far more relevant concern transcends abstract administrative theory to enter the realm of practicality. As the Commission itself recognizes, AM is in desperate need of immediate relief. [31] Yet, undoubtedly sincere intentions aside, ***nothing of use has been done to meet that need!*** It has been over two years since Commissioner Pai addressed the NAB Radio show urging that the FCC launch an AM radio revitalization initiative in early 2013 that was to be completed within a year. [32] Yet it was not until late 2013 that the *AM Revitalization NPRM* was released. At that time, he stated:

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[28] *See, e.g., AM Revitalization NPRM, supra*, at ¶ 4.

[29] The FCC itself clearly recognizes this principle, as it has proposed opening a window for new FM translators for which only existing AM stations would be eligible, thus denying other legally-qualified entities the right to apply. *AM Revitalization NPRM, supra*, at ¶¶ 11-18.

[30] Letter at 5. The same section of the Letter cited the "potentially far-reaching effects of this waiver on the AM industry." As we have already noted, *supra*, at 5-6, potential reliance upon a waiver grant by other similarly-situated parties cannot justify withholding relief in favor of eventual rulemaking.

[31] *AM Revitalization NPRM, supra*, at ¶ 2. There, the FCC cited some dire statistics: "In the mid-1980s, AM radio represented 30 percent of the nation's radio listening hours. By 2010, that number had dropped to 17 percent, with AM radio comprising only 4 percent of listening hours among younger Americans." *Id.*, footnotes omitted.

[32] http://www.fcc.gov/document/commissioner-pai-remarks-radio-show (last accessed Oct. 17, 2014).

In the short term, we'll need to act quickly to provide AM broadcasters with relief while we come up with more permanent fixes for the band's difficulties. … We should also make it easier for AM stations to get and use FM translators. In 2009 the FCC amended its rules to allow AM stations to be rebroadcast on FM translators. I've heard firsthand how this step has been a lifeline for many AM broadcasters. But I've also heard from countless station owners who are frustrated by their inability to get a translator. [33]

Now another year has passed, the comment cycle closed in March, and yet no action has been taken. While the Commission's current focus reportedly seems to be on opening a window to enable each AM station to apply for one translator, there is no assurance, especially in congested markets, that sufficient channels and usable sites will be available to accommodate them. Nor is there any suggestion of how mutually-exclusive applications can be resolved quickly and in full accordance with FCC auction mandates and *Ashbacker* requirements.

Rulemakings present a further practical challenge of timing. The rulemaking that paved the way for the instant matter, enabling FM translators to rebroadcast AM stations, was not decided until nearly two years after the rulemaking notice was issued. [34] ***AM radio cannot wait that long.*** Rulemaking clearly is not a timely route to redress a critical situation. Here, as the waiver request pointed out, immediate relief ***is*** available. Grant of the subject waiver – and, yes, similar waivers that other fraught AM licensees may need – will provide a speedy and efficient solution to a pressing existential problem. [35]

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[33] https://apps.fcc.gov/edocs_public/attachmatch/DOC-323398A1.pdf (last accessed Oct. 17, 2014).

[34] *See,* respectively, *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Notice of Proposed Rulemaking, 22 FCC Rcd 15890 (2007) and *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642 (2009). Reconsideration and judicial review of controversial decisions threaten to prolong implementation yet further. Thus, reconsideration is still pending of the 2006 decision to streamline AM community of license changes, cited at n. 29 of the Letter.

[35] The other long-term remedies proposed in the *AM Revitalization NPRM* all suffer from problems that may preclude immediate relief. Specifically, site changes, power increases (and consequent on-going utility cost increases) and other facility modifications will be prohibitively expensive for stations that already face financial distress. VHF migration or digital conversion would be highly desirable but could be expensive and will require a lengthy transition period for consumers to replace their receivers.

Conclusion – In view of the foregoing, WAY and MMTC respectfully request that the subject waiver be granted, so that not only W218CR but other FM translators can move to enable WTCJ and other AM stations with impaired reception to reach listeners in their service areas. [36]

Respectfully Submitted,

WAY MEDIA, INC.

By Bob Augsburg / P. Gutmann
Bob Augsburg, Its President

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MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL

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October 17, 2014

[36] Alternatively, even if the Commission were to deny the specific relief requested by WAY and MMTC, it should consider amending its definition of "minor" translator changes to include site moves to within the 0.025 mV/m contour of a proposed AM primary station in a spectrum-available market. In that way, needed service would be expedited without foreclosing opportunities for others to file for comparable (and potentially competing) facilities.

CERTIFICATE OF SERVICE

Peter Gutmann, an attorney at the law firm of Womble Carlyle Sandridge & Rice, PLLC, hereby certifies that he caused a true copy of the foregoing "Application for Review" to be mailed, postage prepaid, on this 17th day of October, 2014, to the following:

Peter H. Doyle, Esq.
Chief, Audio Division, Media Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

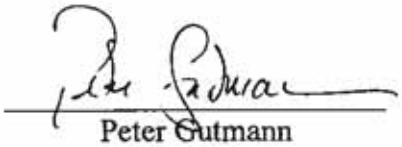
Honorable Tom Wheeler, Chairman **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Mignon Clyburn **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Jessica Rosenworcel **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Ajit Pai **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Honorable Michael O'Rielly **
Federal Communications Commission
445 12th Street SW
Washington, DC 20554



Peter Gutmann

** – By hand.

WCSR 4510192v1
WCSR 33098115v5

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MMTC KEY ISSUES

October 2014

1. Open Internet enforcement to protect consumers
2. Designated Entity NPRM; secondary market transactions
3. Broadcast Ownership: 310(b)(4); Tell City translator case
4. EEO in high tech; status of the Diversity Committee

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September 17, 2014

Hon. Tom Wheeler
Chairman
Hon. Mignon Clyburn
Hon. Ajit Pai
Hon. Jessica Rosenworcel
Hon. Michael O'Rielly
Commissioners
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

RE: Diversity and EEO in the Tech Sector

Dear Chairman Wheeler and Commissioners:

The Minority Media and Telecommunications Council (MMTC) respectfully requests that the Commission assign its Advisory Committee for Diversity in the Digital Age (Diversity Committee) the task of researching the causes of troubling employment patterns and practices in the technology sector. This task fits right into the jurisdiction of the Committee, whose most recent Charter provides that it shall "provide recommendations to the FCC regarding policies and practices that will further enhance diverse participation in the telecommunications and *related* [emphasis added] industries."[1]

With media and telecom now amounting to 1/6 of our economy, few issues are more vital to telecommunications policy than workforce diversity. As the Commission has learned from regulating EEO in broadcasting, employment opportunities are the key to obtaining the skills and networking contacts necessary if one is to become an owner and decision-maker.[2] While the

[1] FEDERAL COMMUNICATIONS COMMISSION, CHARTER OF THE FCC'S ADVISORY COMMITTEE ON DIVERSITY FOR COMMUNICATIONS IN THE DIGITAL AGE (2011), *available at* http://transition.fcc.gov/DiversityFAC/docs/charter-2011.pdf (last visited Sept. 15, 2014).

[2] *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, MM DOCKET NOS. 98-204, 96-16, 13 FCC Rcd 23004 ¶37 (rel. Nov. 20, 1998) ("Work experience in the broadcasting industry permits minorities and women to obtain the skills needed to acquire and run a broadcast station, may help them in becoming aware of ownership opportunities, and may facilitate obtaining capital, as financing sources are generally more willing to work with borrowers that

Commission has not yet decided whether it has, or should ask Congress for, direct regulatory authority over EEO in the high tech industry, it's clear that the industry's abysmal failure to employ African Americans, Hispanics and women detrimentally impacts the FCC's ability to fulfill Congress' commands that the FCC regulate EEO and promote employment and ownership diversity in the industries with which high tech converges – broadcasting, cable, and satellites.[3]

Industry convergence and stark employment gaps within the technology sector necessitate an investigation by the Diversity Committee, and appropriate follow-through either by the Commission itself, another federal agency,[4] or a referral to Congress for FCC jurisdictional authority.

The communications industry of the future will be very different from the industry the Commission now regulates under its direct authority. Traditional access points, such as television sets, are no longer primary for younger media consumers.[5] Today, American video consumers between the ages of 18 and 34 have more than twice the exposure to video programming via their smartphones than TVs.[6] Further, some 89% of smartphone users and 81% of tablet users

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have a track record in the business they seek to own and operate."); *see also* H.R. Rep. No. 934, 98th Cong., 2d Sess. at 84-85 (1984) ("[A] strong EEO policy is necessary to assure that there are sufficient numbers of minorities and women with professional and management level experience within the cable industry, so that there are significant numbers of minorities and women with the background and training to take advantage of existing and future cable system ownership opportunities.")

[3] 47 U.S.C. §257(a) (envisioning the removal of market entry barriers in the provision and ownership of both telecommunications and information services.).

[4] *See Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC2d 2320 (1978) (empowering the Commission to work collaboratively on EEO compliance issues with its sister agency, the EEOC).

[5] *See, e.g.* Cecilia Kang, *TV is increasingly for old people,* THE WASHINGTON POST (Sept. 5, 2014), *available at* http://www.washingtonpost.com/news/business/wp/2014/09/05/tv-is-increasingly-for-old-people?utm_content=buffer5f8a1&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer (last visited Sept. 15, 2014) ("The median age of a broadcast or cable television viewer during the 2013-2014 TV season was 44.4 years old, a 6 percent increase in age from four years earlier. Audiences for the major broadcast network shows are much older and aging even faster, with a median age of 53.9 years old, up 7 percent from four years ago … The median age in the U.S. was 37.2, according to the U.S. Census.").

[6] DOUNIA TURRILL, NIELSEN, INC., AN ERA OF GROWTH: THE CROSS-PLATFORM REPORT 5 (2013) (Forty-four percent of smartphone multimedia mobile and video users are between the ages of 18 and 34, compared to 21% of TV users), *available at* http://www.nielsen.com/us/en/insights/reports/2014/an-era-of-growth-the-cross-platform-report.html (last visited Sept. 15, 2014).

consume video content via apps.[7] These trends imply the media jobs of the future will look more like technology jobs than traditional TV/radio production, advertising sales, and on-air occupations, in order to meet the demand of aging millennial consumers trained on mobile devices.[8] This is reflected in Bureau of Labor Statistics data projecting an 11-point gap in job growth through 2022 between computer and mathematical occupations (18%), and arts, design, entertainment, sports, and media occupations *combined* (7.0).[9]

Traditionally, the technology sector has approached this, which it has characterized as a "talent gap", by pursuing measures to raise the cap on H-1B visas granted to workers from overseas.[10] Some critics have claimed that the effort to raise the cap on H1-B visas is designed to enable some technology companies to avoid hiring older, more expensive, American workers.[11] However, policymakers should also consider whether the effort to raise the cap on H1-B visas has been at best premature as long as high tech companies are bypassing recruitment and engagement at colleges and universities with large minority enrollments, such as Historically Black, Hispanic, and Native American institutions in the "fly-over states" far from the Silicon Valley.[12] An inquiry by the Diversity Committee would shed light on the extent to which technology companies recruit on campuses with high minority enrollments, actively mentor minorities for careers in the technology sector, and select diverse candidates who are U.S. citizens or residents.

Indeed, changes to the media industry business model have not translated into a proportionate growth in employment opportunities for minorities (Exhibit A). Over recent months, following the urging of the Reverend Jesse Jackson Sr. and the Rainbow PUSH Coalition, several

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[7] *Id.* at 7-8.

[8] *See* U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR SELECTED AGE GROUPS BY SEX FOR THE UNITED STATES, STATES, COUNTIES, AND PUERTO RICO COMMONWEALTH AND MUNICIPIOS: APRIL 1, 2010 TO JULY 1, 2013 (2013), *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Sept. 15, 2014) (as of July, 2013 there are 65 million millennials, or those aged 20-34).

[9] BUREAU OF LABOR STATISTICS, EMPLOYMENT PROJECTIONS – 2012-2022 at 3 (2013), *available* at http://www.bls.gov/news.release/pdf/ecopro.pdf (last visited Sept. 15, 2014).

[10] *See, e.g.* Kyung M. Song, *Microsoft Push for Worker Visas Raises Concerns, exposes loopholes*, THE SEATTLE TIMES (Nov. 24, 2012), *available at* http://seattletimes.com/html/localnews/2019758596_microsoftvisa25m.html (last visited Sept. 15, 2014) ("Microsoft is so eager to find qualified engineers and programmers for its thousands of vacancies that it has offered to pay a bounty to the government in exchange for extra visas in order to import more foreign workers.)

[11] *Id.* ("Researchers claim that some companies use the visas to bypass older, more expensive American job seekers. And some economists question contentions by Microsoft and other technology firms about a dearth of domestic high-tech talent.")

[12] Incredibly, "[t]hree of four, or 74%, of students earning a bachelor's degree in science, technology, engineering and math ... don't work in STEM jobs." Wendy Koch, *Jesse Jackson: Tech Diversity is the next Civil Rights Step,"* USA Today, July 29, 2014.

technology companies have released data showing what many in the civil rights community have known for some time: the technology sector is overwhelmingly comprised of white and Asian males, in both tech and non-tech occupations.[13] Google's workforce is comprised of 70% men and 30% women.[14] For tech occupations at Google, 17% are comprised of women, with 83% comprised of men.[15] With respect to race and ethnicity, Google reports just 2% and 3% of its overall workforce are black or Hispanic, respectively, compared to 61% for whites and 30% for Asians.[16] Google's non-tech workforce is 65% white and 23% Asian.[17] Other technology companies report similar demographics. For example, Twitter reports a workforce that is 70% male, 2% black and 3% Latino.[18] Facebook's workforce is 69% male, 57% white, 34% Asian and just 2% black and 4% Hispanic.[19] And while Oakland, CA-based Pandora, the music streaming service, has an overall workforce comprised of 50.8% women and 49.2% men, in tech roles the percentages are 82.1% and 17.9%, respectively, and its racial and ethnic composition is 70.9% white, 12.3% Asian, 7.2% Latino, and 3% black.[20]

With the laudable exception of Asian American male participation, these statistics closely resemble the statistics of the broadcasting industry in the late 1960's.[21] The broadcasting

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[13] *See Rev. Jesse Jackson and Rainbow PUSH Coalition Statement on Pandora's Decision to Release its Workforce Data*, July 15, 2014 ("*The tech industry is perhaps the worst industry in the nation when it comes to* inclusion that locks out Blacks and Latinos from participation and opportunity" (emphasis in original).

[14] GOOGLE OFFICIAL BLOG, GETTING TO WORK ON DIVERSITY AT GOOGLE (May 28, 2014) *available at* http://googleblog.blogspot.com/2014/05/getting-to-work-on-diversity-at-google.html (last visited Sept. 15, 2014).

[15] *Id; see also* Gail Sullivan, *Google Statistics Show Silicon Valley has a Diversity Problem,"* Washington Post, May 29, 2014 (describing statistics for women, who comprise 30% of Google's employees worldwide, 17% for the company's tech sector, and 21% of leadership positions; asking, *inter alia*, "why are there so few women in leadership roles? And what accounts for their high attrition rate?")

[16] *Id.*

[17] *Id.* Rainbow PUSH reports that 70% of Silicon Valley jobs are not tech positions. *See Jesse Jackson has Silicon Valley's Number,* Crain's Business/Chicago, August 6, 2014.

[18] Janet Van Huysse, *Building a Twitter we can be proud of*, TWITTER BLOG (July 23, 2014) https://blog.twitter.com/2014/building-a-twitter-we-can-be-proud-of (last visited Sept. 15, 2014).

[19] Maxine Williams, *Building a More Diverse Facebook*, FACEBOOK NEWSROOM (June 25, 2014), http://newsroom.fb.com/news/2014/06/building-a-more-diverse-facebook/ (last visited Sept. 15, 2014).

[20] Pandora Careers Website, http://www.pandora.com/careers/#diversity (last visited Sept. 15, 2014).

[21] *See* Jason Lagria, NO, VOLOKH: ASIAN IS NOT THE NEW WHITE | AAPI VOICES AAPIVOICES.COM (2014), http://aapivoices.com/stem-aapi-not-white/ (last visited Sept. 14, 2014). The article includes a more detailed treatment on the issue of Asian American participation in Silicon Valley.

industry's extremely poor statistical record was a major factor motivating the FCC to adopt its original broadcast EEO rules.[22] These statistics were alarming then and, in today's information-based society, they should be even more alarming today. The digital divide cannot be closed when a sixth of the economy so profoundly and uniformly excludes African Americans, Latinos and women from equal employment opportunity.

As the media, telecommunications, and technology sectors converge, diversity in all of these sectors increasingly falls within the inner penumbra of the Commission's authority. Thus we look forward to working with the Commission to ensure that the full benefits of technology, and the opportunities it enables, are readily available to all Americans.

Sincerely,

David Honig
President

Attachment (Exhibit A: Workforce by Gender and Ethnicity)

/dh

[22] *See Nondiscrimination in the Employment Practices of Broadcast Licensees (MO&O and NPRM)*, 13 FCC2d 766 (1968) (proscribing racial and gender discrimination in broadcast employment) and *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices (R&O)*, 18 FCC2d 240 (1969) (adopting broadcast EEO outreach requirements).

Exhibit A

Workforce By Gender and Ethnicity

#	Name of Firm	Time Period (Global Staff)	By Gender			By Ethnicity								
			Male	Female	Gender Undisclosed	White	Asian	Hispanic	Black	Two Or More Races	Other/Not Disclosed	Native Hawaiian/Other API	Amer. Indian/Alaska Native	Undeclared
1	Apple	August 2014	70.0%	30.0%	-	55.0%	15.0%	11.0%	7.0%	2.0%	1.0%	-	-	9.0%
2	Yahoo	June 2014	62.0%	37.0%	1.0%	50.0%	39.0%	4.0%	2.0%	2.0%	2.0%	-	-	-
3	Google	January 2014	70.0%	30.0%	-	61.0%	30.0%	3.0%	2.0%	4.0%	>1%	-	-	-
4	Facebook	June 2014	69.0%	31.0%	-	57.0%	34.0%	4.0%	2.0%	3.0%	0.0%	-	-	-
5	Linkedin	June 2014	61.0%	39.0%	-	53.0%	38.0%	4.0%	2.0%	2.0%	>1%	-	-	-
6	Twitter	June 2014	70.0%	30.0%	-	59.0%	29.0%	3.0%	2.0%	3.0%	2.0%	1.0%	>1%	-
7	Ebay	June 2014	58.0%	42.0%	-	61.0%	24.0%	5.0%	7.0%	1.0%	1.0%	-	-	-
8	Pandora Overall	August 2014	50.8%	49.2%	-	70.9%	12.3%	7.2%	3.0%	5.7%	-	1.0%	-	-
	-	Pandora Tech Roles	82.1%	17.9%	-	62.1%	26.0%	3.9%	2.8%	4.9%	-	0.4%	-	-

Sources:

Wendy, K. (2014, July 28). Jesse Jackson Seeks EEOC Scrutiny of Tech Industry. USAToday.Com. News Site. Retrieved from http://www.usatoday.com/story/tech/2014/07/28/jesse-jackson-seeks-eeoc-scrutiny-of-tech-industry/13270991/ (last visted August 2014)

Pandora. (2014, August). Diversity at Pandora.Pandora.Com. Company Webpage. Retrieved fromhttp://www.pandora.com/careers/#diversity (last visited August 25, 2014)

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September 18, 2014

MEMORANDUM

TO: FCC GN Dockets 14-28 and 10-127 (Protecting and Promoting the Open Internet Framework for Broadband Internet Service)

RE: Application of the EEOC Complaint Process to 1996 Telecommunications Act Section 706 Complaints Regarding the Open Internet

Summary

This memorandum provides a summary of the U.S. Equal Employment Opportunity Commission (EEOC) process for resolving complaints of employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"),[1] and describes how this enforcement paradigm could be imported into the FCC's Internet regulatory process under Section 706 of the Telecommunications Act of 1996. In their formal comments and reply comments in the Open Internet rulemaking proceeding, the 45 National Minority Organizations have proposed importing the Title VII complaint model to facilitate enforcement of the open Internet.[2]

Title VII provides that a possible victim of discrimination, before she institutes a civil suit, must first submit a complaint, or charge, of discrimination to the EEOC and

[1] While the EEOC enforces numerous laws dealing with employment discrimination, *see Federal Laws Prohibiting Job Discrimination Questions and Answers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Nov. 21, 2009), http://www.eeoc.gov/facts/qanda.html (last visited Sept. 15, 2014), this Memorandum focuses on the complaint process for Title VII. The complaint processes for most other anti-discrimination statutes are similar, although the exhaustion requirements may differ. For example, exhausting EEOC remedies is optional under the Equal Pay Act.

[2] *See* Comments of the National Minority Organizations in GN Dockets 14-28 and 10-27, Protecting and Promoting the Open Internet Framework for Broadband Internet Service, (filed July 15, 2014) ("National Minority Organizations' Comments"), pp. 12-14; Reply Comments of the National Minority Organizations in GN Dockets 14-28 and 10-27, Protecting and Promoting the Open Internet Framework for Broadband Internet Service, (filed Sept. 15, 2014).

obtain a "Notice of Right to Sue."[3] In this way, the EEOC's complaint process is designed to promote informal, expeditious and affordable resolution of disputes without requiring resort to the court system.

After an individual files a charge of discrimination with the EEOC, the complaint proceeds through multiple levels of review and informal settlement efforts. If the complaint is not resolved or acted upon by the government, the EEOC issues a Notice of Right to Sue to the complaining individual, allowing them to pursue their claim on their own through the court system.

A similar process could be instituted by the FCC as part of its open Internet enforcement program to ensure expeditious and cost-efficient resolution of complaints of potential violations of open Internet rules.

Filing an EEOC Charge

The EEOC enforces violations of Title VII, which prohibits employment discrimination based on sex, race, color, religion, and national origin.[4] Any individual who is "aggrieved" by an employment action may file a charge of discrimination with the EEOC, including individuals who are not in a direct employer-employee relationship but are nevertheless affected by discriminatory employment action.[5] If the aggrieved individual cannot or does not wish to come forward, another individual or organization can file a charge on their behalf.[6] A member of the EEOC can also file a charge of discrimination on behalf of others.[7]

EEOC charges must be filed in person at one of the EEOC's 53 field offices or by mail, and individuals can use the EEOC's online assessment system and a telephone hotline to provide basic information about a potential charge and determine whether the EEOC can help. The EEOC has also entered into work-sharing agreements with certain state and local agencies, such as human relations or human rights commissions, that enforce state and local laws related to employment discrimination. Under these work-sharing agreements, any charge filed with the EEOC is automatically filed with the appropriate state and local agency.[8]

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[3] 42 U.S.C. §2000e-5(f)(1).

[4] *Id*. at §2000e-2(a)(1).

[5] *Id*. at §2000e-5.

[6] 29 C.F.R. §1601.7(a) ("A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization.")

[7] 42 U.S.C. §2000e-5(a) and (b).

[8] *How to File a Charge*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/howtofile.cfm (last visited Sept. 15, 2014). *But see* LARSON ON EMPLOYMENT DISCRIMINATION §70.05 n. 3 (noting that the EEOC has discontinued the practice of using work-sharing agreements where a charge filed with a state human rights agency would be automatically filed with the EEOC).

Information obtained from individuals who contact the EEOC is not disclosed to an employer unless a charge is filed. Once a charge is filed, the EEOC must send a copy of a charge to the employer within 10 days of the filing date.[9] The EEOC will disclose the individual's name and basic information about the allegations in the charge. An individual can only remain anonymous if another individual or organization files a charge with the EEOC on their behalf. The employer will learn the identity of the individual who filed the charge, but the identity of the alleged victim of discrimination will not be disclosed by the EEOC.[10]

Employers are not allowed to retaliate against any individuals who file an EEOC charge or take part in an EEOC investigation or lawsuit. If an employer does so, an EEOC investigator can amend the charge to add allegations of retaliation. Additional non-retaliation charges can be added to a previous EEOC charge or can be the subject of a new EEOC charge.[11]

Dismissal and Mediation

Once an individual has filed an EEOC charge, the EEOC can choose to dismiss the charge, refer it to mediation, or move directly to investigating the charge. If the EEOC lacks jurisdiction over a charge, or if a charge is untimely, the EEOC will dismiss it without further action. The EEOC also dismisses certain charges if they decide that they cannot prove discrimination.[12]

Upon receiving a charge, the EEOC may ask the individual and the employer to try to settle the charge through mediation. Mediation of EEOC charges is voluntary, and if either party does not agree to enter into mediation, the charge will be referred directly to an investigator. If the parties are able to reach an agreement through mediation, the agreement is enforceable as a contract.[13] If an agreement is not reached, the charge will be referred to an investigator.

Investigation, Prosecution, and Settlement

If the parties do not agree to mediate a charge or cannot reach an agreement through mediation, the charge proceeds to the EEOC's investigation phase. In this phase, the EEOC determines whether there is probable cause that a violation of the law has occurred. During its investigation, the EEOC can obtain information through voluntary

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[9] 42 U.S.C. §2000e-5(b).

[10] *Confidentiality*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/confidentiality.cfm (last visited Sept. 15, 2014).

[11] *Id.*

[12] *Filing a Charge of Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/charge.cfm (last visited Sept. 15, 2014).

[13] *Mediation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/mediation.cfm (last visited Sept. 15, 2014).

cooperation or through use of administrative subpoenas to obtain documents, testimony, or access to facilities.[14]

If the EEOC determines that a violation of the law has not occurred, the EEOC provides the individual who filed the charge with a Notice of Right to Sue. This notice allows the individual to file a lawsuit in a court of law. If the EEOC determines that a violation of the law has occurred, it will attempt to reach a voluntary settlement with the employer. If a settlement cannot be reached, the charge is referred to the EEOC's legal staff or the Department of Justice for enforcement. The EEOC or the Department of Justice will then determine whether to file a lawsuit. If a suit is not filed, the EEOC will issue a Notice of Right to Sue to the individual who filed the charge.[15]

Individuals who have filed a Title VII charge can request a Notice of Right to Sue, but usually must wait 180 days after filing the claim to make the request.[16] Title VII encourages the EEOC to determine whether a charge is supported by reasonable cause within 120 days, but this is more of a goal than a hard deadline.[17] The EEOC's website states that while charges referred to mediation are resolved in an average of three months, charges that proceed through the investigation process take an average of six months to reach resolution.[18] This delay is often attributed to the high number of complaints the EEOC receives.[19]

The Complaint Process for the Open Internet

Neither Title II of the Communications Act,[20] nor Section 706 of the Telecommunications Act[21] provides an effective or affordable enforcement process for

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[14] For more information on the EEOC's subpoena power, *see* 29 C.F.R. §1601.16.

[15] *The Charge Handling Process*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/process.cfm (last visited Sept. 15, 2014).

[16] *After You Have Filed a Charge*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/afterfiling.cfm (last visited Sept. 15, 2014).

[17] 42 U.S.C. §2000e-5(b) ("The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge.")

[18] *The Charge Handling Process*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/employees/process.cfm (last visited Sept. 15, 2014).

[19] *See* LARSON ON EMPLOYMENT DISCRIMINATION §73.02 n. 5 (noting that in 2006, "the EEOC took in 75,768 new private-sector charges and investigators resolved 74,308; 403 charges resulted in filed lawsuits.")

[20] For reasons unrelated to enforcement, the National Minority Organizations generally oppose reclassification of broadband as a common carrier service under Title II. *See* National Minority Organizations' Comments, pp. 8-10. As it happens, the Title II complaint process is highly specialized and consumer-unfriendly. Under Section 208 of the Communications Act, a consumer may submit a petition that sets forth a statement of facts; then the FCC then forwards the complaint to the common carrier, which must then

consumer complaints about open Internet rule violations in the manner the FCC seeks to resolve them.[22]

Unlike in the field of employment discrimination, open Internet violations are likely to be rare.[23] However, as in the field of employment discrimination, resolution of complaints needs to be very expeditious. If a job seeker is faced with expensive, protracted anti-discrimination litigation, she may easily become discouraged, stop fighting, and focus on trying to seek employment elsewhere. Similarly, if faced with an expensive, protracted enforcement process at the FCC, a consumer experiencing an open Internet violation could also quickly become discouraged, stop fighting, and focus on obtaining service elsewhere. Further, even a few days of a serious violation could undermine consumer confidence in the Internet and, potentially, alter consumers' patterns of online use and functionality. Faced with high barriers to enforcement, most complainants will simply move on, and the underlying violation could thus become "capable of repetition, yet evading review."[24] Further, if a violation persists unremedied

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resolve the complaint or submit a reply. *See* 47 U.S.C. §208(a); 47 C.F.R. §1.717 (the FCC's corresponding regulation on common carrier complaint procedure). Assuming the common carrier resolves the matter within the timeframe allotted, the common carrier is relieved of its legal liability to that complainant for the instance at issue. The Section 208 process is expensive – highly specialized lawyers are almost always required – and time consuming. Certainly it was not designed with the open Internet in mind, and if the Commission chose to regulate broadband under Title II, the agency would need to develop much more consumer-friendly regulations to implement Section 208.

[21] *See* 47 U.S.C. §1302 (Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, §706, 110 Stat. 56, 153 (1996), as amended by Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. §1301 *et seq*.

[22] *See Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, 5618 ¶163 (May 15, 2014) ("We tentatively conclude that an effective institutional design for the rules proposed in today's Notice must include at least three elements. *First*, there must be a mechanism to provide legal certainty, so that broadband providers, end users and edge providers alike can better plan their activities in light of clear Commission guidance. *Second*, there must be flexibility to consider the totality of the facts in an environment of dynamic innovation. *Third*, there must be effective access to dispute resolutions by end users and edge providers alike.")

[23] *See* David Honig, Esq. and Nicol Turner Lee, Ph.D., *Refocusing Broadband Policy: The New Opportunity Agenda For People Of Color*, Nov. 21, 2013 ("MMTC Broadband White Paper"), available at http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf (last visited Sept. 18, 2014), p. 12.

[24] *See, e.g., Roe v. Wade*, 410 U.S. 113, 114 (1973) (An injury, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated). This term usually arises when an issue becomes moot when the harm occurs over too short a time to allow the injury to be litigated while it was occurring, and there is a reasonable

for a substantial length of time, it could damage the fabric of the network compact and undermine consumer confidence in the online ecosystem.

While the FCC surely possesses the authority to regulate broadband under Section 706,[25] this section fails to specify an enforcement procedure.[26] Consequently, the procedure for adjudicating complaints under Section 706 would be the FCC's default procedure applicable to any statutory provision that implicitly leaves it to the agency to decide how complaints should be handled.[27] Alternatively, perhaps the Commission would revert to a paradigm similar to its 2010 open Internet complaint rules, which are highly specialized and not expedited.[28]

A key element of the Commission's general complaint handling procedure is that the agency is only compelled to render a decision that is both appealable and precedential. That takes time. Drafts must circulate within the Enforcement Bureau, the relevant operating bureau, OGC and, sometimes, OSPP and the 8th floor. On the other hand, an EEOC probable cause determination can often be rendered in a matter of days. This determination is neither appealable nor precedential, but it is rapid and efficient in enabling the EEOC's expert staff to advise the parties regarding the likely merits of a complaint. As a practical matter, after a cause or no cause determination by the EEOC, most cases settle in or out of mediation. Further, the parties still have the opportunity to proceed to court and obtain an appealable, precedential decision if they choose to do so.

This paradigm is a very neat fit for the open Internet. It would enable the FCC's expert staff to provide expeditious guidance to the parties, and it would enable the parties to then resolve their differences or proceed to litigation with the benefit of an expert early appraisal of the merits. In this way, the Title VII model would provide an excellent, consumer-friendly means of resolving open Internet complaints rapidly, efficiently, and affordably.

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expectation that the party or other similarly situated parties may be subject to a reoccurrence of the harm. *See Turner v. Rogers*, 131 S. Ct. 2507, 2515 (2011).

[25] *See Verizon v. FCC*, 740 F.3d 623, 637-642 (2014).

[26] *See* 47 U.S.C. §1302.

[27] *See* 47 C.F.R. §1.41 ("Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally. Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request. In application and licensing matters pertaining to the Wireless Radio Services, as defined in §1.904 of this part, such requests may also be sent electronically, via the ULS.")

[28] *See* 47 C.F.R. §§8.12-17.

Adapting the EEOC's Title VII Complaint Process to the FCC's Open Internet Complaint Process

The FCC could adapt the in-person EEOC filing requirements by creating online assessment and hotline assistance programs and creating a digital complaint form. Upon receiving a complaint, the Enforcement Bureau would promptly review the case, provide guidance to the parties regarding their likelihood of success on the merits, and decide whether to 1) dismiss the complaint for failure to establish a *prima facie* case of a violation; 2) refer it to the FCC's Administrative Law Judge or his designee for mediation; or 3) open an investigation.

Upon determining that a violation has not occurred, the Enforcement Bureau would dismiss the case and provide the complainant with a Notice of Right to Litigate - similar to the EEOC's Notice of Right to Sue, except that the FCC's Notice of Right to Litigate would authorize the complainant to file a formal charge with the full Commission or its designee, such as the ALJ or a Special Master. When a case is especially egregious, the Bureau could bring a complaint to the full Commission on its own, much as the EEOC can proceed to court if it is presented with an especially egregious case.[29] Finally, regardless of the disposition of the case, the complainant could always request and receive a Notice of Right to Litigate.

Conclusion

The EEOC's complaint process serves a vital role in resolving most employment discrimination complaints before they reach the court system. By encouraging voluntary mediation and informal settlement, the EEOC reduces the strain on the judiciary while promoting swift resolution of discrimination claims. At the same time, the EEOC retains the ability to investigate and pursue legal action against employers that have violated Title VII. If no action is taken, individuals can pursue their legal claims privately through civil lawsuits. In so doing, the EEOC complaint process acts as a first line of defense against Title VII violations, guaranteeing that individuals will have their complaints heard by the EEOC or will be free to proceed on their own.

In the same way, this process, if adapted to open Internet enforcement, could be a first line of defense for consumers who believe they are aggrieved by an apparent violation of Internet openness. The Title VII framework would provides the FCC with a flexible and enforceable legal framework, a clearly established set of factors and guidance, and a mechanism to allow the FCC to evaluate challenged practices on a case-by-case basis affordably, efficiently and expeditiously.[30] Such a procedure should help alleviate any misimpression that Section 706 is insufficiently muscular to preserve Internet openness, while at the same time building consumer confidence in the FCC's stewardship of the open Internet.

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[29] *See* n. 15 *supra.*

[30] 47 C.F.R. §8.9; *Open Internet Order*, 25 FCC Rcd at 17964-65, para. 111.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127

COMMENTS OF THE NATIONAL MINORITY ORGANIZATIONS:

100 Black Men
A. Philip Randolph Institute
American Indians in Film and Television
Asian Pacific American Institute for Congressional Studies
Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship
Blacks In Government
Communications Consumers United
Council of Korean Americans
Dialogue on Diversity
Federation of Southern Cooperatives
Hispanic Telecommunications and Technology Partnership
Innovation Generation
International Black Broadcasters Association
Japanese American Citizens League
Latinos in Information Sciences and Technology Association
Leadership Education for Asian Pacifics, Inc.
MANA - A Latina Organization
Minority Business Roundtable
Minority Media and Telecommunications Council
National Association of Black County Officials
National Association of Multicultural Digital Entrepreneurs
National Association of Neighborhoods
National Bankers Association
National Black Caucus of State Legislators
National Black College Alumni Hall of Fame Foundation, Inc.
National Black Farmers Association
National Black Religious Broadcasters
National Coalition for Black Civic Participation
[additional organizations are set out on the following page]

National Policy Alliance
National Congress of Black Women
National Hispanic Caucus of State Legislators
National Hispanic Foundation for the Arts
National Organization of Black County Officials
National Organization of Black Elected Legislative Women
National Puerto Rican Chamber of Commerce
National Puerto Rican Coalition
OCA – Asian Pacific American Advocates
Rainbow PUSH Coalition
SER - Jobs for Progress
The Latino Coalition
Universal Impact
U.S. Black Chambers of Commerce, Inc.

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July 18, 2014

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EXECUTIVE SUMMARY

The National Minority Organizations, a coalition of 42 highly respected national civil rights, social service, and professional organizations representing millions of constituents, urge the Commission to focus its broadband policies on promoting engagement, adoption, and informed broadband use by communities of color, and to exercise its Section 706 authority to protect all consumers' rights to an open Internet. To that end, the Commission should establish an accessible, affordable, and expedited procedure for the resolution of complaints. We recommend such a procedure be modeled after Title VII of the 1964 Civil Rights Act to complement the Commission's proposed expansion of transparency and its Ombudsperson proposal.

Almost every party that has participated before the Commission in this and similar proceedings supports the goal of Internet openness. That includes this coalition, which strongly believes that every consumer, entrepreneur, and business has a right to the protections of an open Internet. The only disagreement before the Commission is on the means to achieve this goal. The National Minority Organizations recognize that access to broadband, adoption, and digital literacy are critical civil rights issues – broadband is essential to living a life of equal opportunity in the 21st century. Without broadband access, low income and middle-class Americans – and particularly people of color – cannot gain new skills, secure good jobs, obtain a quality education, participate in our civic dialogue, or obtain greater access to healthcare through tele-health technologies.

Yet communities of color continue to under-adopt broadband for reasons that include availability, affordability, relevance, and digital literacy. The National Minority Organizations urge the Commission to prioritize a policy agenda that advances first-class digital citizenship and continues to stimulate investment in broadband infrastructure. Our organizations also urge the Commission to avoid Title II reclassification given the still fragile state of minority engagement in the digital ecosystem.

If strong consumer protections are adopted and enforced, and a presumption against paid prioritization is adopted, Section 706 would be well suited to meet the goals of the Commission and communities of color. This authority will enable the Commission to adopt and enforce *smart* net neutrality rules that meet the goals of transparency and equity, while fostering broadband adoption and informed use. Section 706 has been successful in paving the way for today's open Internet, protecting consumers, promoting digital literacy and civic engagement, connecting schools and communities, and stimulating employment and entrepreneurship. Under the Kennard/Powell/Genachowski regulatory paradigms, communities of color have benefited exponentially, as demonstrated by their use of technology applications, products, and services. Even as these communities struggle with residential broadband adoption, people of color who have adopted broadband engage digitally at rates equal to or surpassing that of the general population, illustrating the benefits of broadband and the critical need to expand adoption for all communities of color. We recommend that the Commission maintain this regulatory course. The Commission should also use its Section 706 authority to ban redlining of fast broadband service – the greatest threat to first class digital citizenship the nation faces today.

In contrast to Section 706, Title II regulation would adversely affect adoption and thereby harm communities of color. Given the still fragile state of minority engagement in the digital ecosystem, our nation cannot afford the impact that reclassification would have on stifling

broadband adoption among vulnerable populations and limiting the investment and innovation that have benefitted our constituents. In particular, the National Minority Organizations fear the impact of strict Title II regulation on adoption and investment in local infrastructure and jobs. A common carrier approach to broadband regulation would slow down broadband adoption and stifle the growth and innovation of the Internet. Title II regulation, with its monopoly telephone-era directives, is not the path to a continued vibrant, growing, innovative, job-creating, empowering open Internet. Moreover, if the Commission chooses to regulate ISPs like utilities, consumers will bear the costs, and communities of color will suffer disproportionately through diminished infrastructure investments and a weakened climate for innovation.

Ensuring that every American has access to broadband is one of the most critical civil rights challenges of the 21st century. Any regulatory framework that does not emphasize broadband adoption, competition, and innovation would be detrimental to communities of color. Faced with important choices in this proceeding, the Commission should focus its broadband policies on promoting engagement, adoption, and informed broadband use by people of color, seniors, rural, and low income families stranded without broadband access. The agency can use Section 706 to ensure that all Americans retain the right to an open Internet without widening the digital divide in the process, and it should establish an accessible, affordable, and expedited procedure for resolution of complaints.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127

COMMENTS OF THE NATIONAL MINORITY ORGANIZATIONS

The National Minority Organizations, a coalition of 42 highly respected national civil rights, social service, and professional organizations[1] – representing millions of constituents from across the country – respectfully submit these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") and the Wireline Competition Bureau's Public Notice in the above-captioned proceedings.[2] We urge the Commission to focus its broadband policies on promoting engagement, adoption, and informed broadband use by communities of color and to exercise its Section 706 authority to protect all consumers' rights to an open Internet. Communities of color respectfully request a policy agenda that enables first class digital citizenship and continues to stimulate investment in broadband innovation and infrastructure. Our nation cannot afford the impact that Title II reclassification would have on

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[1] These comments represent the views of each organization institutionally and are not intended to reflect the views of the organizations' respective officers, directors, advisors, or members.

[2] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61 (rel. May 15, 2014) ("NPRM"); *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access*, Public Notice, DA 14-748 (rel. May 30, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0530/DA-14-748A1.pdf (last visited July 14, 2014).

stifling broadband adoption among vulnerable populations and limiting the investment and innovation that have benefitted our constituents.

I. INTRODUCTION

Almost every party that has participated before the Commission in this and similar proceedings supports the goal of Internet openness. That includes this coalition of National Minority Organizations, which strongly believe that every consumer, entrepreneur and business has a right to the protections of an open Internet. The only disagreement before the Commission is on the means to achieve this goal. The National Minority Organizations recognize that access to broadband, adoption, and digital literacy are critical civil rights issues, and we seek a balanced, transparent open Internet regime that protects consumers and narrows the digital divide for communities of color.

Fifty years ago this month, President Lyndon Johnson signed into law the landmark Civil Rights Act of 1964. As President Barack Obama said upon marking this milestone anniversary, the legislation "transformed our understanding of justice, equality, and democracy and advanced our long journey to a more perfect Union," but "[a]s we reflect on the Civil Rights Act and the burst of progress that followed, we also acknowledge that our journey is not complete."[3] Today, broadband access, adoption, and digital literacy join the suite of civil rights prerequisites to first class citizenship in the digital age. Broadband is essential to living a life of equal opportunity in the 21st century. Broadband impacts other fundamental civil rights and it drives our political process. It is the key to ensuring justice, equality, and democracy. Yet despite the importance of

[3] Presidential Proclamation – 50th Anniversary of the Civil Rights Act (June 30, 2014), available at http://www.whitehouse.gov/the-press-office/2014/06/30/presidential-proclamation-50th-anniversary-civil-rights-act (last visited July 9, 2014).

broadband access, communities of color continue to under-adopt current and emerging technologies.[4]

To date, millions of Americans have not adopted broadband for a variety of reasons including availability, affordability, relevance, and digital literacy.[5] This is unacceptable. The National Minority Organizations come together recognizing that communities of color have a high stake in the outcome of broadband policy issues and cannot be bystanders to results that impact our desired outcomes of equity and inclusion. As Commissioner Clyburn has noted, "It is imperative that we get everyone connected. Digital exclusion will further prevent our brothers and sisters, especially those in challenged communities, from truly participating in the most basic facets of today's society."[6]

Without broadband access, low income and middle-class Americans – and particularly people of color - cannot gain new skills, secure good jobs, obtain a quality education, participate

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[4] *See* David Honig, Esq. and Nicol Turner Lee, Ph.D., *Refocusing Broadband Policy: The New Opportunity Agenda For People Of Color*, Nov. 21, 2013 ("MMTC Broadband White Paper"), available at http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf, at 7-8 ("While the promise of broadband is being realized by some, a large number of African Americans and Hispanics are still not online, citing relevance first and the lack of digital literacy skills second as critical reasons.").

[5] As Commissioner Clyburn has said, affordability is a primary barrier to greater adoption. National Urban League, Broadband Internet is Fundamental to Civil Rights (2012), *available at* http://politic365.com/2012/07/27/national-urban-league-broadband-internet-is-fundamental-to-civil-rights/ (last visited July 9, 2014) ("NUL Clyburn Remarks") ("People should not have to choose between feeding their families and paying for the transformational benefits of broadband."). *See* MMTC Broadband White Paper at 8 ("[A] large number of African Americans and Hispanics are still not online, citing relevance first and the lack of digital literacy skills second as critical reasons.").

[6] NUL Clyburn Remarks. *See also* John Eggerton, *David Cohen: Broadband Access is Central Civil Rights Issue*, BROADCASTING & CABLE (July 10, 2013), available at http://www.broadcastingcable.com/news/washington/david-cohen-broadband-access-central-civil-rights-issue/61589 (describing a keynote address delivered by David Cohen of Comcast Corporation at MMTC's Hall of Fame luncheon and Access to Capital conference, in which Cohen said that getting broadband to every household, regardless of race, color, creed, or economic situation is this century's central civil rights struggle, and the battle for equal opportunities "won't be won so long as we have people stranded on the wrong side of the digital divide ….").

in our civic dialogue, or obtain greater access to healthcare through tele-health technologies. Thus, any regulatory plan governing broadband *must* promote engagement, adoption, and informed use by people of color.

The National Minority Organizations urge the Commission to exercise its authority under Section 706 to adopt enforceable rules that will ensure an open Internet for all and promote broadband adoption among consumers and communities of color. As a matter of the greatest urgency, the Commission should also use its Section 706 authority to proscribe and prevent redlining, which seriously threatens equal access to essential fast broadband service. While we recognize the importance of the open Internet debate, we urge the Commission to refocus its priorities on the issues – particularly redlining – that directly and profoundly impact first class digital citizenship.[7]

II. SECTION 706 IS FAR BETTER SUITED TO MEETING THE GOALS OF THE COMMISSION AND COMMUNITIES OF COLOR THAN TITLE II RECLASSIFICATION

The Commission should use its Section 706 authority to ensure an open Internet. If it is coupled with a presumption against paid prioritization and with strong and well enforced consumer protections, the Commission's Section 706 authority would be well suited to enable the Commission to adopt and enforce *smart* net neutrality rules that meet the goals of transparency and equity, while fostering broadband adoption and informed use.

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[7] *See* Telecommunications Act of 1996, Section 706(b), 47 U.S.C. § 1302(b) ("[In an annual inquiry,] the Commission shall determine *whether [broadband] is being deployed to all Americans* in a reasonable and timely fashion. If the Commission's determination is negative, *it shall take immediate action to accelerate deployment of such capability by removing barriers* to infrastructure investment and by promoting competition in the telecommunications market.") (emphasis added). The National Minority Organizations will address this issue in depth in a subsequent filing. The Commission should also modernize the E-rate, facilitate telemedicine and mobile health innovation, and expand broadband employment and entrepreneurship opportunities for people of color. These efforts cannot continue to be placed on hold while the debate over open Internet regulation "consume[s] all of the energies and time that [should] be devoted to these aforementioned issues." MMTC Broadband White Paper at 10.

For nearly 20 years, regulators from both political parties have charted a successful course for Internet policy; the Commission should continue on this path. The regulatory paradigms adopted under the regimes of FCC Chairmen William Kennard,[8] Michael Powell,[9] and Julius Genachowski[10] have been successful in paving the way for today's open Internet, protecting consumers,[11] promoting digital literacy and civic engagement, connecting schools and communities, and stimulating employment and entrepreneurship.[12] In contrast, Title II would adversely affect adoption and thereby harm communities of color.[13]

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[8] William E. Kennard, Chairman, FCC, *Before the National Cable Television Association* (June 15, 1999), available at http://transition.fcc.gov/Speeches/Kennard/spwek921.html (last visited July 14, 2014).

[9] Michael Powell, Chairman, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry*, at 2 (Feb, 8, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf (last visited July 14, 2014).

[10] Julius Genachowski, Chairman, FCC, *Preserving the Open Internet* (2010) available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A2.pdf (last visited July 14, 2014) (rejecting "extremes in favor of a strong and sensible, non-ideological framework. … The rules … we adopt today are rooted in ideas first articulated by Republican Chairmen … and endorsed in a unanimous FCC policy statement in 2005.").

[11] Since the FCC adopted its Internet Policy Statement in 2005, there have been relatively few examples of content discrimination or other unreasonable behavior by ISPs. *See* MMTC Broadband White Paper at 12. Moreover, the FCC's annual "Measuring Broadband America" report details the speed and performance of broadband connections and calls out degradation of services among broadband providers. Any negative effect on broadband performance due to content prioritization is designed to show up on this annual report card, thus making the industry more accountable – and in some cases, more competitive in touting their service quality.

[12] On July 15, the original due date for these Comments, the FCC's system "crashed" under the weight of one million filings. See Hon. Tom Wheeler, The Need to Modernize the FCC's IT Systems," FCC Blog Post (July 16, 2014), available at http://www.fcc.gov/blog/need-modernize-fcc-s-it-systems (last visited July 17, 2014). The fact that it was possible for one million filings to find their way to the FCC in one day is a testament to how successful the Internet has been under the Kennard/Powell/Genachowski paradigms and without Title II classification.

[13] *See* Minority Media & Telecom Council Letter, *Protecting and Promoting the Open Internet, GN Docket No. 14-28* (March 28, 2014), available at http://mmtconline.org/wp-content/uploads/2014/03/MMTC-Open-Internet-Letter-032814.pdf (last visited July 14, 2014).

A. The Current Regulatory Structure Promotes Digital Engagement By Communities Of Color, And The Commission Should Maintain This Course

Under the Kennard/Powell/Genachowski regulatory paradigms, communities of color have benefited exponentially, as demonstrated by their use of technology applications, products, and services. Even as these communities struggle with residential broadband adoption, people of color who have adopted broadband engage digitally at rates equal to or surpassing that of the general population. This engagement clearly illustrates the benefits of broadband in 21st century America and how critical it is to expand broadband adoption for all communities of color.

For example, nearly 75 percent of African American and 68 percent of Hispanic cell phone owners use their devices to access the Internet,[14] and these numbers are increasing.[15] African Americans and Latinos use smartphones for non-voice applications, such as web surfing and accessing multimedia content, at a higher rate than the population in general.[16] Asian Americans have adopted smartphones at a higher rate than the total U.S. population.[17] People of color also have largely embraced social media services, such as Twitter and Instagram. *The Wall Street Journal* reported that "Hispanics tweet more often than other users," while approximately

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[14] Maeve Duggan and Aaron Smith, Pew Research Internet Project, Cell Internet Use 2013 (Sept. 16, 2013), available at http://www.pewinternet.org/2013/09/16/main-findings-2/ (last visited July 14, 2014).

[15] From April 2012 to May 2013, the number of African Americans using their phone to access the Internet increased ten percentage points, while the number of Hispanics increased five percentage points. Maeve Duggan and Aaron Smith, Pew Research Internet Project, Cell Internet Use 2013 (Sept. 16, 2013), available at http://www.pewinternet.org/2013/09/16/main-findings-2/ (last visited July 14, 2014).

[16] *See* Kathryn Zickuhr & Aaron Smith, Home Broadband 2013, Pew Internet & American Life Project (Aug. 2013), available at http://www.pewinternet.org/files/old-media/Files/Reports/2013/PIP_Broadband%202013_082613.pdf (last visited July 14, 2014). *See also* Nielsen, More of What We Want – Media and Entertainment (June 30, 2014), available at http://www.nielsen.com/us/en/insights/reports/2014/more-of-what-we-want.html (last visited July 14, 2014) (reporting that African Americans and Hispanics are more likely than other ethnic groups to watch video on demand).

[17] Nielsen, Significant, Sophisticated, and Savvy: The Asian American Consumer at 19 (2013), available at http://www.aaja.org/wp-content/uploads/2013/12/Nielsen-Asian-American-Consumer-Report-2013.pdf (last visited July 14, 2014).

18 percent of Twitter's users in the U.S. are African Americans (compared to the ten percent of U.S. Internet users who are African American).[18] African Americans and Hispanics also use Instagram at a significantly higher rate than the general population,[19] and Asian Americans are more frequent purchasers of mobile apps than non-Hispanic whites.[20] These communities are using broadband to connect, and those who are not leveraging new technologies are being left behind.

While the promise of home broadband has been fully realized by many Americans, people of color, particularly those that are low income, rural and older, are often offline.[21] Thanks to the Commission's history of encouraging rather than restraining the growth of the broadband marketplace, the primary public policy challenge today is no longer the universal availability of wireline and wireless service.[22] Rather, the key question is how to improve digital literacy, increase relevance, and reduce costs. Policies that deter efforts to foster broadband adoption will have profound effects on people of color, particularly those in need of broadband Internet to fully participate in society.

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[18] Yoree Koh, Twitter Users' Diversity Becomes an Ad Selling Point, The Wall Street Journal (Jan. 20, 2014), available at http://online.wsj.com/news/articles/SB10001424052702304419104579323442346646168?mg=reno64-wsj (last visited July 14, 2014).

[19] *Id.*

[20] Nielsen, Significant, Sophisticated, and Savvy: The Asian American Consumer at 11 (2013), available at http://www.aaja.org/wp-content/uploads/2013/12/Nielsen-Asian-American-Consumer-Report-2013.pdf (last visited July 14, 2014).

[21] Twenty-four percent of Hispanics and 15 percent of African-Americans are non-Internet users. *See* Kathryn Zickhur, Who's Not Online and Why?, Pew Internet & American Life Project (Sept. 25, 2013), available at http://www.pewinternet.org/Reports/2013/Non-internet-users.aspx (last visited July 14, 2014).

[22] Similarly, the current regulatory framework has fostered innovation and competition. *See* MMTC Broadband White Paper at 9 (detailing the level of availability, investment, competition, and speeds of the U.S. broadband market).

Thus, we urge the FCC to maintain, through Section 706, a regulatory posture that would incentivize innovation and facilitate ongoing efforts to bridge the digital divide.

B. Reclassifying Broadband Under Title II Would Adversely Impact Broadband Adoption And Investment

Given the still fragile state of minority engagement in the digital ecosystem, the National Minority Organizations fear the impact of stringent Title II regulation on adoption and investment in local infrastructure and jobs.[23] In our view, Section 706 will be very effective in protecting consumers, and it will accomplish that goal without imposing legacy rules designed for monopoly Plain Old Telephone Service ("POTS") on modern day competitive services. A common carrier approach to broadband regulation would slow down broadband adoption and stifle the growth and innovation of the Internet. Regulating broadband under Title II would also foster a climate of uncertainty, potentially choke innovation and diminish investment.[24] Antiquated common carriage requirements, such as rate regulation and limits on content partnerships that do not offend antitrust law – all upon which the Commission would need to make individualized decisions on whether or not to forbear[25] – would lead to years of regulatory ambiguity and litigation.

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[23] This concern of the National Organizations was also the focus of a letter sent to the Commission by 20 Congressional Members. *See Green Leads Letter to Chairman on Net Neutrality*. May 14, 2014, available at https://green.house.gov/press-release/green-leads-letter-fcc-chairman-net-neutrality (last visited July 14, 2014).

[24] *See generally* Justin P. Hedge, *The Decline of Title II Common-Carrier Regulations in the Wake of Brand X: Long-Run Success for Consumers, Competition, and the Broadband Internet Market*, CommLaw Conspectus: Journal of Communications Law and Technology Policy (2006), available at http://scholarship.law.edu/cgi/viewcontent.cgi?article=1340&context=commlaw (last visited July 14, 2014).

[25] While the current Commission could choose to forbear from imposing regulations under a Title II approach, today's Commission cannot bind future commissions. A future commission could rescind a forbearance decision. It does not benefit anyone to have continued legal uncertainty and the corollary drain on resources. A regulatory structure always in flux undoubtedly will chill capital investment in broadband infrastructure - a result directly contrary to the interests of communities of color.

While some argue that Title II would stabilize pricing for consumers, this out-of-date regulatory framework also could increase prices for consumers through rate rebalancing and the imposition of increased access charges and taxes on an already burdened universal service program.[26] These and other regulatory constraints would ultimately limit full digital participation, especially for consumers on fixed or lower incomes.[27] Under a Title II regime, communities of color and other disadvantaged communities would shoulder the cost of heavier users that congest the Internet with video streaming and other bandwidth-intensive uses.[28] New and late Internet adopters with different online needs would find themselves subsidizing heavier online users,[29] a result that will further deter adoption or make it difficult for new users to afford to sustain connectivity.

Title II regulation, with its monopoly telephone-era directives, is not the path to a continued vibrant, growing, innovative, job-creating, empowering open Internet. If the

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[26] *See e.g.* Robert Litan, Regulating Internet Access as a Public Utility, Brookings Institution, June 2014, available at http://www.brookings.edu/~/media/research/files/papers/2014/06/regulating_internet_access_public_utility_litan/regulating_internet_access_public_utility_litan.pdf (last visited July 14, 2014) ("Robert Litan's Internet as a Public Utility") ("Understandably, the ISPs oppose that path forward, and so do others who fear that public utility regulation of Internet access – complete with rate filings and FCC approvals, among other requirements – would dampen innovation and investment in more, faster broadband.")

[27] *See* Daniel A. Lyons, *Internet Policy's Next Frontier: Data Caps, Tiered Service Plans, and Usage-Based Broadband Pricing*, Federal Communications Law Journal 66, no. 1 (2013), available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1602&context=lsfp (last visited July 14, 2014), at 26 ("Usage-based pricing may make entry-level broadband adoption more affordable."). *See also* Kevin A. Hassett and Robert J. Shapiro, *Towards Universal Broadband Flexible Broadband Pricing and the Digital Divide*, Georgetown Center for Business and Public Policy, August 2009, available at http://www.gcbpp.org/files/Academic_Papers/AP_Hassett_Shapiro_Towards.pdf (last visited July 14, 2014).

[28] *See id.*

[29] The Commission has recognized this fact: "Requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users." *Preserving the Open Internet: Broadband Industry Practices*, 25 FCC Rcd 17905, 17945 ¶ 72 (2010).

Commission chooses to regulate ISPs like utilities, consumers will bear the costs, and communities of color will suffer disproportionately through diminished infrastructure investments and a weakened climate for innovation.[30] Overly burdensome regulations treating broadband as a public utility[31] would institutionalize second class digital citizenship, needlessly delaying the digital inclusion goals sought by communities of color. This result would harm both consumers of color and minority entrepreneurs, for whom the Internet has been their easiest path to entry to bring new content to their communities and the nation.

Four years ago, the National Broadband Plan recognized the Internet's potential for achieving equality of opportunity, but also acknowledged that "digital exclusion compounds inequities for historically marginalized groups."[32] Minority and low income communities already suffer disproportionately from lower levels of investment in public goods, such as transportation, the electric grid, and schools.[33] Communities of color deserve an agenda that enables first-class digital citizenship – not rules that would result in underinvestment in broadband infrastructure. Such an outcome in the form of Title II reclassification would be a poor policy choice that our nation cannot afford. To continue the positive trajectory of digital engagement and meet the goals of communities of color, the Commission should avail itself of

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[30] *See* Anna Maria Kovacs, *The Internet Is Not a Rotary Phone*, Recode, May 12, 2014, available at http://recode.net/2014/05/12/the-internet-is-not-a-rotary-phone/ (last visited July 14, 2014) ("Annual broadband investment by phone companies has more than doubled since 2006, culminating in roughly $18 billion in broadband investment in 2013 (out of a total of $26 billion). The cable industry, which has never been subject to Title II, spent nearly $14 billion on its networks in 2013.").

[31] *See generally* Robert Litan's Internet as a Public Utility.

[32] FCC, *Connecting America: The National Broadband Plan* at 129 (2010).

[33] *See, e.g.*, Thomas W. Sanchez, *et al.*, Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities (June 2003), available at http://civilrightsproject.ucla.edu/research/metro-and-regional-inequalities/transportation/moving-to-equity-addressing-inequitable-effects-of-transportation-policies-on-minorities (last visited July 14, 2014; Linda Darling-Hammond and Laura Post, Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership in Low-Income Schools (2000), available at http://stanford.edu/~ldh/publications/LDH-Post-Inequality.pdf (last visited July 14, 2014).

its judicially-upheld legal authority under Section 706[34] and avoid the consumer harms that would spring from Title II reclassification.

C. The Commission Should Use Its Section 706 Authority To Protect The Open Internet

The National Minority Organizations support the existing regulatory course – built on a foundation of transparency, disclosure and equal access to all services – which has helped preserve a free and open Internet for all Americans. By using its Section 706 authority, the Commission can adopt rules and bring enforcement actions that will ensure the right of people of color and all American consumers to an open Internet. The Commission must use this authority to protect consumers, including the most vulnerable new broadband adopters, and to keep any ISP missteps in check. Specifically, the Commission should take a straightforward approach that includes:

- The immediate reinstatement of no-blocking rules to protect consumers.

- Creating a new rule barring commercially unreasonable actions, while affording participants in the broadband economy, particularly minority entrepreneurs, the opportunity to enter into new types of reasonable commercial arrangements[35] and, through monitoring by the FCC's Office of Communications Business Opportunities, ensuring that minority entrepreneurs are never overlooked by carriers seeking to develop these new commercial arrangements.

- Establishing a rebuttable presumption against paid prioritization that protects against "fast lanes" and any corresponding degradation of other content, while ensuring that such presumption can be overcome by business models that sufficiently protect consumers and have the potential to benefit consumer welfare (for example, telemedicine applications). Any prioritized service that overcomes the presumption would remain subject to enforcement, and consumers would be able to obtain rapid relief by working with the Ombudsperson and/or through the complaint process based on Title VII of the 1964 Civil Rights Act, discussed in Section III, below.

- Underscoring the need for transparency. Enforceable disclosure requirements are the key to consumer protection online. The existing transparency rule has

[34] *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[35] NPRM, ¶ 116.

worked, and the enhanced transparency proposed in the NPRM is laudable.[36] The Commission correctly notes that some consumers may have difficulty understanding commonly used terms associated with the provision of broadband services,[37] and thus there may be ways to make the content and format of disclosures more accessible and understandable to end users.[38] The National Minority Organizations agree that the "manner in which providers display information to consumers can have as much impact on consumer decisions as the information itself."[39]

- Using Section 706 to punish bad actors, especially those engaged in blocking, as the D.C. Circuit confirmed the Commission has authority to do.[40]

With these actions, the Commission can ensure that consumers remain well protected and continue to enjoy the benefits of an open Internet.

III. CONSUMERS HARMED BY VIOLATIONS OF THE OPEN INTERNET RULES SHOULD HAVE THE RIGHT TO AN ACCESSIBLE, AFFORDABLE, EXPEDITED PROCESS TO RESOLVE COMPLAINTS

The National Minority Organizations believe that enforceable open Internet rules under Section 706 will work only if consumers, particularly the most vulnerable, have access to an affordable and expedited process to resolve complaints. First, the Commission should adopt its proposal to create the position of Open Internet Ombudsperson, an individual "whose duty will be to act as a watchdog to protect and promote the interests of edge providers, especially smaller entities."[41] The Ombudsperson must be equally responsible for protecting and promoting the interests of consumers, particularly individuals from more vulnerable populations, who may be new to using broadband and may have less confidence in their digital literacy. In addition, the Commission appropriately asks what "pleading or procedural requirements [should] be adopted

[36] NPRM, ¶¶ 67-73.

[37] NPRM, ¶ 68.

[38] NPRM, ¶ 72.

[39] *Id.*

[40] *Id.* (citing *Verizon*, 740 F.3d at 655).

[41] NPRM, ¶ 171.

that make access to Commission processes by individuals or small businesses less cumbersome."[42] One approach that would avoid placing an unfair burden and cost on consumers would be to use a consumer-friendly complaint process such as that established under Title VII of the 1964 Civil Rights Act[43] as a model. Title VII was designed to eliminate discrimination in employment based on race, color, sex, religion, or national origin. The Title VII complaint process[44] was created to offer rapid and affordable remedies for employment discrimination faced by people of color and women.[45] Congress determined in 1964 that the path to enforceable employment equality was a complaint process that could be used at little to no cost to the complainant, with no need to hire a lawyer or write a complicated filing. In like manner, the Commission should adopt an accessible open Internet complaint process that protects consumers who have been harmed and serves as a deterrent to would-be bad actors.

If the Commission looks to Title VII as a model, the National Minority Organizations would be glad to serve as a resource in designing an effective enforcement mechanism that translates the key components of the Title VII approach into the FCC context. The critical aspect

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[42] *Id.* (emphasis added).

[43] Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. (Pub. L. 88-352), as amended by the Civil Rights Act of 1991 (Pub. L. 102-166) and the Lily Ledbetter Fair Pay Act of 2009 (Pub. L. 111-2).

[44] Before judicial review can be sought under Title VII, a complainant first files an employment discrimination claim with the Equal Employment Opportunity Commission. *See* How to File a Charge of Employment Discrimination, available at http://www.eeoc.gov/employees/howtofile.cfm (last visited July 14, 2014).

[45] *See e.g.* U.S. Equal Employment Opportunity Commission, Significant EEOC Race/Color Cases, available at http://www.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm (last visited July 15, 2014). *See also* U.S. Equal Employment Opportunity Commission, Administrative Enforcement and Litigation, available at http://www.eeoc.gov/eeoc/enforcement_litigation.cfm (last visited July 16, 2014); U.S. Equal Employment Opportunity Commission, Enforcement and Litigation Statistics, available at http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm (last visited July 16, 2014; *id* (follow link to "Title VII of the Civil Rights Act of 1964 Charges") (The enforcement program has been successful in resolving cases with monetary and non-monetary benefits. For example, in Fiscal-Year 2013, 67,558 charges were filed under Title VII with 70,175 resolutions.)

of such a mechanism is that it will offer *rapid* resolution for consumers, who need to have confidence that the Commission's rules will protect them so that they continue to be comfortable participating in the broadband ecosystem. As a general matter, the Commission's primary focus should be to create a user-friendly form that easily can be completed and submitted by a consumer without the need for an attorney. To ensure a smooth and fair process, a consumer should be required to file the complaint within a reasonable period of time – perhaps the 180 days afforded for Title VII complaints. The complainant would have a clear duty to provide sufficient information to establish a *prima facie* case, for example, to state that she was harmed in a specific way by a specific practice. A complainant also could file a complaint based on a perceived systemic problem causing widespread harm. The Commission (likely at the Bureau level on delegated authority) would undertake an initial screening process to be completed quickly; to ensure that the process operates in the expedited manner that is intended, it might be useful to set a specific time frame for agency action. If the Commission finds probable cause to believe that its rules have been violated, the agency could immediately implement a mediation process or take enforcement action.

The Commission can defend consumers' right to an open Internet[46] by establishing a process that allows consumers, even those with little income or limited digital literacy skills, to pursue relief when they are harmed. In Title VII, Congress developed an approach that empowers consumers, achieves results, and is fair to all parties. As communities of color actively pursue greater social and economic equality through broadband, the same considerations of accessibility, affordability, and expeditious process that underlie Title VII should be foundational precepts for the submission and prompt resolution of open Internet complaints.

[46] *See, e.g.*, Remarks of Tom Wheeler, Chairman, FCC, National Cable & Telecommunications Association (Apr. 30, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf ("Let me be clear. If someone acts to divide the Internet between 'haves' and 'have-nots,' we will use every power at our disposal to stop it.").

IV. CONCLUSION

Ensuring that every American has access to broadband is one of the most critical civil rights challenges of the 21st century. Time is of the essence to avoid further widening of the digital divide. Any regulatory framework that does not emphasize broadband adoption, competition, and innovation would be detrimental to communities of color. Faced with important choices in this proceeding, the Commission should focus its broadband policies on promoting engagement, adoption, and informed broadband use by people of color, seniors, and low income families stranded without broadband access. The agency can use Section 706 to ensure that all Americans retain the right to an open Internet without widening the digital divide in the process. Finally, to ensure that the Commission remains a strong protector of consumers, the Commission should establish an accessible, affordable, and expedited procedure for resolution of complaints, such as a process modeled after Title VII of the 1964 Civil Rights Act.

Respectfully submitted,

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July 18, 2014

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-27

REPLY COMMENTS OF THE NATIONAL MINORITY ORGANIZATIONS:

100 Black Men
A. Philip Randolph Institute
American Indians in Film and Television
Asian Pacific American Institute for Congressional Studies
Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship
Black College Communication Association
Black Entertainment and Sports Lawyers Association
Blacks In Government
Communications Consumers United
Council of Korean Americans
Dialogue on Diversity
Federation of Southern Cooperatives
Hispanic Telecommunications and Technology Partnership
Innovation Generation
International Black Broadcasters Association
Japanese American Citizens League
Latinos in Information Sciences and Technology Association
Leadership Education for Asian Pacifics, Inc.
League of United Latin American Citizens
MANA - A Latina Organization
Minority Business Roundtable
Minority Media and Telecommunications Council
National Association of Black County Officials
National Association of Multicultural Digital Entrepreneurs
National Association of Neighborhoods
National Bankers Association
National Black Caucus of State Legislators
National Black College Alumni Hall of Fame Foundation, Inc.
National Black Farmers Association
National Black Religious Broadcasters

[additional organizations are set out on the following page]

National Coalition on Black Civic Participation
National Policy Alliance
National Congress of Black Women
National Hispanic Caucus of State Legislators
National Hispanic Foundation for the Arts
National Organization of Black County Officials
National Organization of Black Elected Legislative Women
National Puerto Rican Chamber of Commerce
National Puerto Rican Coalition
Organization of Chinese Americans
Rainbow PUSH Coalition
SER - Jobs for Progress
The Latino Coalition
Universal Impact
U.S. Black Chambers of Commerce, Inc.

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September 15, 2014

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Framework for Broadband Internet Service	)	GN Docket No. 10-27

REPLY COMMENTS OF THE NATIONAL MINORITY ORGANIZATIONS

The National Minority Organizations, a coalition of 45 highly respected national civil rights, social service, and professional organizations,[1] representing millions of members and constituents from across the country, respectfully submit these Reply Comments in the above referenced proceedings.[2] We reiterate our unwavering support for preserving an open Internet, and continue to urge the Commission to craft policies that will protect consumers and encourage universal broadband access, adoption and proficient use. Universal first-class digital citizenship would greatly benefit all Americans, especially people of color and other vulnerable populations that remain on the sidelines of the digital revolution.

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[1] These Reply Comments represent the views of each organization institutionally and are not intended to reflect the views of the organizations' respective officers, directors, advisors, or members. Additional organizations signing on since the Comments were submitted are the Black College Communication Association, Black Entertainment and Sports Lawyers Association and the League of United Latin American Citizens.

[2] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61 (rel. May 15, 2014) ("NPRM"); *Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks for Broadband Internet Access*, Public Notice, DA 14-748 (rel. May 30, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0530/DA-14-748A1.pdf (last visited Sept. 14, 2014).

I. SUMMARY AND INTRODUCTION

The issue before the Commission is not whether but *how* the agency should act to preserve the open Internet. The National Minority Organizations continue to support an open Internet protected under the Commission's Section 706 regulatory authority coupled with a consumer-friendly complaint process modeled after Title VII of the 1964 Civil Rights Act. This approach to Internet regulation will continue to protect the openness American consumers expect from the Internet while not impeding parallel efforts aimed at closing the digital divide in broadband access, adoption and proficiency.[3] As the Commission moves forward, the rules that emerge from this proceeding should seek not only to preserve openness for current users – they must also ensure that the Internet remains accessible and open for future users and for those on the other side of the digital divide.

II. SECTION 706 REMAINS THE BEST ROUTE FOR IMPLEMENTING STRONG, LEGALLY ENFORCEABLE, AND CONSUMER-FRIENDLY OPEN INTERNET RULES THAT UPHOLD NO BLOCKING AND NO PAID PRIORITIZATION

Based on the historic development of the Commission's broadband policies, our review of the record, and in light of our initial Comments, we maintain that Section 706 is the most *viable* route available for adopting new rules in a manner that will generate the least friction for parallel policy initiatives, while still upholding the principles of no-blocking, no paid prioritization, and heightened transparency. Section 706 has garnered broad support among organizations representing a diverse range of historically marginalized communities including an expansive array of firms, nonprofits, consumer and labor organizations, and scholars.[4] Their

[3] *See generally* Comments of the National Minority Organizations, GN Docket No. 14-28 (July 18, 2014) ("Comments of the National Minority Organizations").

[4] *See, e.g.*, Comments of the Chicagoland Black Chamber of Commerce (July 17, 2014); Comments of the National Black Chamber of Commerce, National Gay & Lesbian Chamber of Commerce, U.S. Hispanic Chamber of Commerce, and U.S. Pan Asian American Chamber of Commerce (July 18, 2014); Comments of the Black Women's Roundtable (July 18, 2014); Florida State Hispanic Chamber of Commerce (July 14, 2014); Asian Americans Advancing Justice (July15, 2014); Comments of Communications Workers of America and National

constituents, like ours, have and will continue to benefit in profound ways from broadband Internet and the array of tools and services that it enables. According to CWA and the NAACP, Section 706 will help to "ensure that there is sufficient future investment and job creation to propel not only economic opportunity, but a permanent bridging of the digital divide."[5]

Based on these and other comments in the record, including those submitted by the National Minority Organizations, there are at least three indisputable benefits associated with using Section 706 as the basis for open Internet rules. These are discussed in turn below.

A. Open Internet Rules Grounded in Section 706 Would be Sufficiently Robust and Legally Enforceable to Achieve Core Goals for the Commission and Communities of Color

A Section 706 open Internet framework would be sufficiently robust to achieve the Commission's core goals – transparency, no blocking, no slow and fast lanes due to a strong presumption against paid prioritization, allowing for business model experimentation that is commercially reasonable,[6] and preventing wrongdoing in an *ex post* manner. As we stated in our initial Comments, "by using its Section 706 authority, the Commission can adopt rules and bring enforcement actions that will ensure the right of people of color and all American consumers to an open Internet."[7] Numerous additional commenters advocating on behalf of historically disadvantaged communities have also embraced this conclusion.[8]

Association for the Advancement of Colored People (July 15, 2014); Comments of League of United Latin American Citizens, National Action Network, National Association for the Advancement of Colored People, the National Coalition on Black Civic Participation, and the National Urban League (July 18, 2014).

[5] *See* Comments of Communications Workers of America and National Association for the Advancement of Colored People, at 2 (July 15, 2014).

[6] *See generally* NPRM.

[7] Comments of the National Minority Organizations, at 11 (July 18, 2014). We have offered an amendment to the Commission's Section 706 approach – a mechanism modeled after Title VII of the 1964 Civil Rights Act to facilitate consumer input and expedite the handling of complaints. *See* Comments of the National Minority Organizations, at 12-14 (July 18, 2014), and §IV *infra.*

[8] *See, e.g.*, Comments of CWA and NAACP, at 21 (July 15, 2014); Comments of the National Black Chamber of Commerce, National Gay & Lesbian Chamber of Commerce, U.S. Hispanic

The U.S. Court of Appeals for the D.C. Circuit recently delineated the Commission's clear authority to regulate broadband under Section 706, so long as it does so in a manner that doesn't contravene other express statutory mandates by treating broadband as a *de facto* common carrier.[9] Accordingly, the Commission could develop rules that would protect against the establishment of slow lanes, while also assuring sufficient latitude to explore business arrangements that are "commercially reasonable." This approach would yield many new opportunities for people of color, especially entrepreneurs and small businesses, both of which would greatly benefit from such current and future relationships with broadband service providers. The Commission recently signaled that encouraging diversity and inclusion in these competitive and evolving industries are of great interest to assure sufficient inclusivity in FCC policymaking and activities in the marketplace.[10] To ensure that open Internet rules allow for these kinds of exploratory collaborations, we believe that the Commission should ground its

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Chamber of Commerce, and U.S. Pan Asian American Chamber of Commerce, at 2-3 (July 18, 2014); Comments of the Black Women's Roundtable, at 1-2 (July 18, 2014).

[9] *See Verizon v. FCC*, 740 F.3d 623, 650 (2014). D.C. Circuit opinions from 2010 and 2012, as well as *Verizon*, have provided all stakeholders – the Commission, service providers, other innovators, and consumers – with a detailed schematic for what a legally enforceable open Internet regime might look like. *See Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) and *Cellco Partnership v. FCC*, 700 F. 3d 534 (D.C. Cir. 2012). Accordingly, service providers and others in this sector have had ample notice regarding the contours of a framework built around Section 706 and allowing for business model experimentation that is deemed to be "commercially reasonable." *See Cellco Partnership v. FCC*, 700 F. 3d at 548 ("And the 'commercially reasonable' standard, at least as defined by the Commission, ensures providers more freedom from agency intervention than the "just and reasonable" standard applicable to common carriers.")

[10] *See* John Eggerton, *Chairman Wheeler Proposes Changes to Designated Entity Rules,* Broadcasting & Cable (Aug. 1, 2014), available at http://broadcastingcable.com/news/washington/chairman-wheeler-proposes-changes-designated-entity-rules/132885 (last visited Sept. 14, 2014) (detailing proposed changes circulated on the 8th floor in a draft Notice of Proposed Rulemaking).

framework in Section 706, a provision that allows for such flexibility,[11] while providing a sufficient baseline to protect against consumer harm.

B. Section 706 Wou1d Assure Sufficient Stability in Maintaining an Open Internet Regime

Of the possible paths forward, Section 706 represents the one most likely to preserve the current stability in the regulatory framework for broadband services. In particular, invoking this provision of the Telecommunications Act will maintain a critical baseline level of regulatory certainty by preserving the current, bipartisan approach to regulating broadband communications successfully developed under the Kennard, Powell, Martin and Genachowski chairmanships.[12]

There is ample data to demonstrate that the current approach has incentivized sustained and very high levels of much-needed private sector investment in deploying advanced broadband infrastructure – wired and wireless alike – throughout the United States.[13] Such investment levels have persisted for more than a decade and have remained at a consistently high level even during

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[11] In the NPRM, the Commission noted that it had tentatively concluded that the unique network characteristics of mobile broadband would support a slightly different application of the open Internet rules than would apply for wired networks. NPRM, ¶62. This echoed conclusions reached by the Commission after a rigorous analysis during its 2010 open Internet rulemaking, wherein the Commission noted that certain "operational constraints" created "challenges in applying a broader set of [open Internet] rules to mobile [broadband services]." *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17957 (2010). The National Minority Organizations agree with the Commission's analysis and generally support its proposed approach for developing and implementing open Internet rules that reflect the unique technological characteristics and market structure of mobile broadband. We will amplify on this issue in subsequent filings in these dockets.

[12] *See* Comments of the National Minority Organizations, at 5 (July 18, 2014) (detailing the genesis and evolution of this bipartisan approach).

[13] *See, e.g.*, David Honig, Esq. and Nicol Turner Lee, Ph.D., *Refocusing Broadband Policy: The New Opportunity Agenda for People of Color*, at 7-16, MMTC (Nov. 21, 2013) ("MMTC Broadband White Paper"), available at http://mmtconline.org/wp-content/uploads/2013/11/Refocusing-Broadband-Policy-112113.pdf (last visited Sept. 14, 2014) In the instant proceedings, numerous commenters have cited to additional data and analysis on this point. *See, e.g., Ex parte* of Christopher S. Yoo (June 10, 2014) (submitting to the FCC a copy of a report titled *U.S. v. European Broadband Deployment: What do the Data Say?*, which includes such data).

the worst economic downturn since the Great Depression, a substantial feat that some have described as "astonishing."[14]

Further, these investments have been deployed wisely to create jobs and foster equal opportunity. As CWA and NAACP have observed, broadband service providers have not only invested far more in their services than other firms in the ecosystem, they have also supported a far greater number of high-paying jobs.[15] And unlike other firms in this sector, especially edge-provider companies, broadband service providers have been known to foster a diverse workforce and procurement systems, which have proved to be valuable sources of jobs for communities of color for many years.[16] As emphasized by LULAC, the National Urban League *et al.*, "[a]ny framework should encourage inclusion and investment – not impede it – and we will not support any framework *ab initio* that would promote ill-defined interests."[17]

Taken together, this kind of interplay between consumer demand, regulation and investment supports the need for stability in the current, historically successful open Internet

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[14] *See* Diana G. Carew and Dr. Michael Mandel, *Infrastructure Investment and Economic Growth: Surveying New Post-Crisis Evidence*, at 2, Progressive Policy Institute (March 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/03/2014.03-Carew_Mandel_Infrastructure-Investment-and-Economic-Growth_Surveying-New-Post-Crisis-Evidence.pdf (last visited Sept. 14, 2014).

[15] *See* Comments of CWA and NAACP, at 7-12 (July 15, 2014). *See also* Diana Carew and Dr. Michael Mandel, U.S. Investment Heroes of 2014: Investing at Home and in a Connected World, Progressive Policy Institute Report (Sept. 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/09/2014.09-Carew_Mandel_US-Investment-Heroes-of-2014_Investing-at-Home-in-a-Connected-World.pdf (last visited Sep. 15, 2014). AT&T, Verizon Communications, and Comcast are each in the top ten for estimated U.S. capital expenditures. Google, Apple, and Amazon trail in the top 25. "Overall, the top 25 list contains four telecom and cable companies, with a total of $46 billion in domestic capital spending. The next highest category in terms of investment is energy production and refining, with six companies accounting for a total of $40 billion in domestic capital spending. The third largest category is Internet and technology companies, containing five companies totaling $22.7 billion, led by Intel, Google, and Apple." *Id*. at 4.

[16] *Id.* at 12 (providing very stark statistics on African American and Hispanic employment by wireline and wireless providers vs. the major edge companies).

[17] Comments of League of United Latin American Citizens, National Action Network, National Association for the Advancement of Colored People, the National Coalition on Black Civic Participation, and the National Urban League, at 2 (July 18, 2014).

framework governing this rapidly growing and evolving marketplace. The benefits reaped by communities of color from this interplay – among them, increased broadband access, opportunities to become entrepreneurs, and a vibrant mobile ecosystem that meets their unique demands for connectivity – similarly support the need for a frictionless transition.[18]

C. Open Internet Rules Based on Section 706 Would Also Provide the Commission With Ample Authority to Protect Against Digital Redlining

The third major benefit of Section 706 is that it provides ample authority for the Commission to police and punish digital redlining.[19] Such exclusionary practices – which occur when service providers choose not to build networks in communities with high percentages of minority or low-income households, have long plagued the communications sector.[20] With broadband adoption rates already lagging in communities of color and among low-income consumers, such practices, if allowed to continue, would negate the gains in investment and

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[18] *See generally id. See also* Comments of the National Minority Organizations, at 6-8 (July 18, 2014).

[19] The Commission's authority is clear from the plain language of the statute. *See* 47 U.S.C. §1302(a) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all Americans* … by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment" and §1302(b) ("The Commission shall ... annually … initiate a notice of inquiry concerning the availability of advanced telecommunications capability to *all Americans* … In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market" (emphasis supplied).

[20] *See*, e.g., *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Reply Comments of MMTC *et al.*, MB Docket No. 05-311 (March 28, 2006), available at http://mmtconline.org/lppdf/MMTCRedliningReply101A8B.pdf (last visited Sept. 14, 2014) (MMTC, along with dozens of other national civil rights and minority advocacy organizations, calling for protections against redlining communities of color).

deployment made under an open Internet framework grounded in Section 706.[21] This authority could also foster more robust competition in under-served communities – a key goal of the Commission.[22] But as the Commission has noted on several occasions in recent months, Section 706(b) empowers it to "take immediate action" if and when it identifies this type of barrier to universal broadband deployment.[23]

These policy tools will be essential when investigating emerging deployment practices that may constitute redlining. Some momentum has built around alternative deployment models that are driven by aggregate neighborhood wealth, which means that networks are only deployed to areas that demonstrate a minimum level of immediate demand for the service.[24] There is evidence that this paradigm is already widening, rather than closing, the digital divide at the local level in communities of color and low-income households.[25] Indeed, as super-fast broadband becomes a necessity, neighborhoods without this service will find themselves unable to attract investment, jobs and opportunity, leaving their residents with permanent, structural second-class digital citizenship. Fortunately, should the Commission elect to exercise its authority under

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[21] *See, e.g.*, MMTC Broadband White Paper, at 7-10 (providing additional discussion and data).

[22] *See* Prepared Remarks of FCC Chairman Tom Wheeler, "The Facts and Future of Broadband Competition," 1776 Headquarters, Washington, DC (Sept. 4, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.docx (last visited Sept. 14, 2014) (setting out the benefits of fast broadband competition for all Americans).

[23] *See, e.g., In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Tenth Broadband Progress Report Notice of Inquiry, at ¶1, GN Docket 14-126 (rel. Aug. 5, 2014) (citing 47 U.S.C. §1302(b)).

[24] *See, e.g.,* Alistair Barr, *Google Fiber is Fast, but is it Fair?*, Wall St. Journal (Aug. 22, 2014), available at http://online.wsj.com/articles/google-fuels-internet-access-plus-debate-1408731700 (last visited Sept. 14, 2014).

[25] *See, e.g., id.;* Jim Redden, *Will Google Fiber Further Portland's Digital Divide?*, KOIN.com (April 29, 2014), available at http://koin.com/2014/04/29/will-google-fiber-further-portlands-digital-divide/ (last visited Sept. 14, 2014) (noting concerns about possible digital redlining resulting from Google's deployment model in Kansas City, MO, and Portland, OR).

Section 706 for the purpose of implementing open Internet rules, it would also have ample authority to protect against exclusionary practices like digital redlining, thereby upholding core notions of social justice for all consumers.

III. RECLASSIFYING BROADBAND AS A TITLE II SERVICE WOULD INJECT UNNECESSARY UNCERTAINTY INTO THE BROADBAND ECOSYSTEM, ENDANGERING PROGRESS TOWARD IMPORTANT GOALS FOR COMMUNITIES OF COLOR

The National Minority Organizations believe that reclassifying all forms of broadband Internet access services as "telecommunications services" subject to public utility-like common carrier regulation under Title II of the Communications Act is inadvisable at this time given the prodigious work that needs to be completed to close the digital divide.[26] As we discussed at length in our initial Comments, electing to use Title II to implement open Internet rules would likely prove disadvantageous to consumers in to the broadband ecosystem.[27] The primary downside of using Title II in this context would be its negative impact on investment in broadband networks, which in turn would undermine broadband adoption by communities of color and "investment in local infrastructure and jobs."[28] That this perspective on the disadvantages associated with Title II has received support from a diverse array of groups representing the interests of a range of disadvantaged communities is notable and should inform any efforts by the Commission to adopt open Internet rules.[29]

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[26] *See* Comments of League of United Latin American Citizens, National Action Network, National Association for the Advancement of Colored People, the National Coalition on Black Civic Participation, and the National Urban League (July 18, 2014).

[27] Comments of the National Minority Organizations, at 8-11 (July 18, 2014).

[28] *Id.* at 8.

[29] *See, e.g.*, Comments of the Chicagoland Black Chamber of Commerce, at 1 (July 17, 2014) ("Simply put, Title II regulations would not allow, we believe, for further needed development and technological evolution of the nation's broadband networks and services."); Comments of the National Black Chamber of Commerce, National Gay & Lesbian Chamber of Commerce, U.S. Hispanic Chamber of Commerce, and U.S. Pan Asian American Chamber of Commerce, at 2 (July 18, 2014) ("Forcing the Internet into a Title II classification can only make it more difficult for individuals to make the highest and best use of this important tool. Notwithstanding

Skepticism about the benefits of reclassification and worries about the substantial harms that would be wrought on communities of color should the Commission head down that path revolve primarily around the likelihood that applying Title II common carrier regulations to the broadband ecosystem would chill investment, slow innovation, and undermine progress toward more robust broadband connectivity in key communities. As we noted in our initial Comments, and as many others have noted in comments in these proceedings, the process of reclassification would necessitate a separate lengthy rulemaking that would yield an order that would in all probably be immediately challenged in court by many different parties and on many different legal bases.[30] At the same time, the Commission would engage in similarly lengthy and complex forbearance proceedings, undertakings that, as history teaches, are typically fraught with intrigue, likely to end up in court, and unable to be relied upon by investors due to a current commission's inability to bind future commissions to forbearance mandates. Together, these various efforts could potentially stall the growth of the ecosystem and impact those communities where access to broadband is needed to achieve first-class, digital citizenship.

As mentioned, some measure of regulatory certainty is essential to sustaining the long-term commitments of resources that undergird broadband network deployment. Further, embracing Title II would clash, in important ways, with the ethos of innovation and disruption that permeates the broadband ecosystem. In other words, it would eliminate incentives to "think

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intentions and promises, many of our members have a healthy skepticism when it comes to being treated equally. We have learned to worry about the law of unintended consequences - when an idea or program of the government turns out to cause far more problems than they solve"); Comments of the Black Women's Roundtable, at 2 (July 18, 2014) ("A Title II regulatory structure would impede broadband access and adoption for Black women and our families in unserved and underserved communities by stifling the growth and innovation of the Internet. Black women and our families in vulnerable unserved and underserved communities cannot afford to bear the costs or become the victims of any unintended consequences that a Title II regulatory structure would impose on the availability and affordability of Internet technology and broadband services.")

[30] Comments of the National Minority Organizations, at 9-10 (July 18, 2014).

outside the box" because doing so would trigger strict application of the menu of regulations that are included in Title II.[31]

Finally, the media and telecommunications industries combined generate about one-sixth of the wealth in the U.S. economy, and broadband is now an essential component to improving quality of life for vulnerable populations and generating economic value for small businesses, especially those that are owned by minorities and women. Any possible disturbance that is spurring broadband adoption and access for these populations could have a particularly devastating impact because, as the recent recession and past downturns have demonstrated in stark detail, the consequences of negative economic shocks big and small tend to be felt much more profoundly in communities that are already reeling. This has certainly been the case for African Americans and Hispanics in the U.S. over the last few years: according to the Urban Institute, between 2007 and 2010, "Hispanic families saw their wealth cut by over 40 percent, and black families saw their wealth fall by 31 percent….[b]y comparison, the wealth of white families fell by 11 percent."[32]

For these reasons, the National Minority Organizations respectfully call on the Commission to keep the goals of broadband adoption, innovation and availability top of mind, recognize that these goals could be impaired by invoking Title II, and instead opt for open Internet rules based on Section 706.

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[31] *See, e.g.,* Mike Montgomery, *How the FCC Can Save Net Neutrality and Still Ruin the Internet*, Huffington Post (Aug. 15, 2014), available at http://www.huffingtonpost.com/mike-montgomery/how-the-fcc-can-save-net-_b_5680464.html (last visited Sept. 14, 2014).

[32] *See* Signe-Mary McKernan *et al.*, *Less than Equal: Racial Disparities in Wealth Accumulation*, at 2, Urban Institute (April 2013), available at http://www.urban.org/UploadedPDF/412802-Less-Than-Equal-Racial-Disparities-in-Wealth-Accumulation.pdf (last visited Sept. 14, 2014).

IV. THE COMMISSION SHOULD LOOK TO TITLE VII OF THE 1964 CIVIL RIGHTS ACT AS A MODEL FOR OPEN INTERNET ENFORCEMENT MECHANISMS

The Commission's Internet enforcement mechanism should be modified to resemble the process embodied in Title VII of the 1964 Civil Rights Act to provide for robust, fair, and expeditious processing and action on consumer complaints. The National Minority Organizations respectfully urge the Commission to consider the enforcement model, described in our initial Comments, that is based on a similar mechanism detailed in Title VII of the 1964 Civil Rights Act, governing equal employment opportunity.

Instead of relying on a more formal complaint process under Section 208,[33] the Title VII model would allow a complainant to provide the Commission with enough information to make out a *prima facie* case of specific or systemic harm, allowing the Commission to conduct an initial screening and, if the Commission's staff issues a non-precedential finding of probable cause, the agency may institute expedited enforcement or mediation.[34] This model would provide consumers with an efficient, affordable and expedited means of pursuing alleged rule violations and other claims against service providers.[35] The National Minority Organizations collectively have enormous experience with Civil Rights Act Title VII EEO enforcement, and they remain at the ready to assist the Commission in crafting and implementing a consumer-friendly enforcement mechanism.[36]

V. CONCLUSION

Nearly 50 years ago, in June 1965, President Lyndon Johnson launched the War on Poverty with a stirring commencement address at Howard University. In his address, President

[33] *See* 47 U.S.C. §208 (Section 208 directs complainants to submit a petition to the Commission, the Commission then forwards the complaint to the common carrier for response, the Commission may then open an investigation).

[34] *See* Comments of the National Minority Organizations, at 14.

[35] Comments of the National Minority Organizations, at 12-14 (July 18, 2014).

[36] *Id.* at 14.

Johnson made a forceful argument for leveraging the power of government not just to end racial discrimination but to assure genuine equal opportunity for all. "It is not enough," he said, "just to open the gates of opportunity. All our citizens must have the ability to walk through those gates."[37] Although much has changed in the ensuing decades, much has remained the same: communities of color still face profound obstacles in their march toward economic and social equality. Fortunately, new technologies like the Internet and new tools like powerful handheld devices are enabling significant progress forward in these and other historically disadvantaged communities.[38] Digital technologies represent perhaps the most level playing field imaginable for users of every kind. But the many benefits that these technologies might be able to generate are not automatic. Broadband must be adopted; devices must be purchased; digital literacy skills must be developed. For these reasons, the sentiment of President Johnson's remarks should guide the Commission's work on open Internet rules. New rules should protect consumers, incentivize innovation, investment and entrepreneurship, and close the digital divide. Accordingly, the National Minority Organizations urge the Commission to rely on Section 706 when developing open Internet rules.

[37] *See* President Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights,"* June 4, 1965, available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp (last visited Sept. 14, 2014).

[38] *See generally* Joycelyn James *et al., On the Path to the Digital Beloved Community: A Civil Rights Agenda for the Technological Age,* MMTC (Jan. 2012), available at http://library.mmtconline.org/BELOVEDBOOK.pdf (last visited Sept. 14, 2014).

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September 15, 2014

Tech jobs: Minorities have degrees, but don't get hired

Elizabeth Weise and Jessica Guynn, USA TODAY *11:42 a.m. EDT October 13, 2014*

(Photo: Getty Images/Creatas RF)

SAN FRANCISCO – Top universities turn out black and Hispanic computer science and computer engineering graduates at twice the rate that leading technology companies hire them, a USA TODAY analysis shows.

Technology companies blame the pool of job applicants for the severe shortage of blacks and Hispanics in Silicon Valley.

But these findings show that claim "does not hold water," said Darrick Hamilton, professor of economics and urban policy at The New School in New York.

"What do dominant groups say? 'We tried, we searched but there was nobody qualified.' If you look at the empirical evidence, that is just not the case," he said.

As technology becomes a major engine of economic growth in the U.S. economy, tech companies are under growing pressure to diversify their workforces, which are predominantly white, Asian and male. Leaving African Americans and Hispanics out of that growth increases the divide between haves and have-nots. And the technology industry risks losing touch with the diverse nation — and world — that forms its customer base.

USA TODAY

Lack of diversity could undercut Silicon Valley

(http://www.usatoday.com/story/tech/2014/06/26/silicon-valley-tech-diversity-white-asian-black-hispanic-google-facebook-yahoo/11372421/)

On average, just 2% of technology workers at seven Silicon Valley companies that have released staffing numbers are black; 3% are Hispanic.

But last year, 4.5% of all new recipients of bachelor's degrees in computer science or computer engineering from prestigious research universities were African American, and 6.5% were Hispanic, according to data from the Computing Research Association.

The USA TODAY analysis was based on the association's annual Taulbee Survey, which includes 179 U.S. and Canadian universities that offer doctorates in computer science and computer engineering.

"They're reporting 2% and 3%, and we're looking at graduation numbers (for African Americans and Hispanics) that are maybe twice that," said Stuart Zweben, professor of computer science and engineering at The Ohio State University in Columbus.

"Why are they not getting more of a share of at least the doctoral-granting institutions?" said Zweben, who co-authored the 2013 Taulbee Survey report.

USA TODAY

High-tech pay gap: Minorities earn less in skilled jobs

(http://www.usatoday.com/story/tech/2014/10/09/high-tech-pay-gap-hispanics-asians-african-americans/16606121/)

An even larger gulf emerges between Silicon Valley and graduates of all U.S. colleges and universities. A survey by the National Center for Education Statistics showed that blacks and Hispanics each made up about 9% of all 2012 computer science graduates.

Nationally, blacks make up 12% of the U.S. workforce and Hispanics 16%.

Facebook, Twitter, Google, Apple and Yahoo declined to comment on the disparity between graduation rates and their hiring rates.

LinkedIn issued a statement that it was working with organizations to "address the need for greater diversity to help LinkedIn and the tech industry as a whole."

Google said on its diversity blog (http://googleblog.blogspot.com/2014/05/getting-to-work-on-diversity-at-google.html) in May that it has "been working

with historically black colleges and universities to elevate coursework and attendance in computer science."

USA TODAY

Tech: Where the women and minorities aren't

(http://www.usatoday.com/story/tech/2014/05/29/silicon-valley-tech-diversity-hiring-women-minorities/9735713/)

In his blog post (http://www.apple.com/diversity/) on diversity, Apple's CEO Tim Cook cited improving education as "one of the best ways in which Apple can have a meaningful impact on society. We recently pledged $100 million to President Obama's ConnectED initiative to bring cutting-edge technologies to economically disadvantaged schools."

All of the companies have insisted they are hiring all of the qualified black and Hispanic tech workers they can find.

In an interview earlier this year, Facebook Chief Operating Officer Sheryl Sandberg said the key to getting more women and minorities into the technology field had to start with improvements to education.

"We are not going to fix the numbers for under-representation in technology or any industry until we fix our education system," she said.

Others say tech giants simply don't see the programmers right in front of them.

Janice Cuny directs the Computer Education program at the National Science Foundation. She says black and Hispanic computer science graduates are invisible to these companies.

"People used to say that there were no women in major orchestras because women didn't like classical music. Then in the 1970s they changed the way people auditioned so it was blind, the listeners couldn't see the players auditioning. Now the numbers are much more representative," she said.

The same thing happens in the tech world, said Cuny. "There are these subtle biases that make you think that some person is not what you're looking for, even when they are."

USA TODAY

Jesse Jackson: Tech diversity is next civil rights step

(http://www.usatoday.com/story/tech/2014/07/28/jesse-jackson-seeks-eeoc-scrutiny-of-tech-industry/13270991/)

One of the key problems: There are elite computer science departments that graduate larger numbers of African-American and Hispanic students, but they are not the ones where leading companies recruit employees. Stanford, UC-Berkeley, Carnegie Mellon, UCLA and MIT are among the most popular for recruiting by tech companies, according to research (http://www.wired.com/2014/05/alumni-network-2/) by Wired magazine.

"That is the major disconnect," said Juan Gilbert, a professor of computer and information science at the University of Florida in Gainesville.

"The premise that if you want diversity, you have to sacrifice quality, is false," he said. His department currently has 25 African-American Ph.D. candidates. Rice University in Houston has a large number of Hispanic students.

"These are very strong programs, top-ranked places that have excellent reputations," he said. "Intel has been hiring from my lab, and they say our students hit it out of the ballpark."

Justin Edmund says he was fortunate to attend Carnegie Mellon. Today he's the seventh employee at Pinterest and one of the top designers at the San Francisco start-up valued at $5 billion.

He's also one of the few African Americans in his company.

"There's a lot of things that can be done to fix the problem, but a lot of them are things that Silicon Valley and technology companies don't do," Edmund said. "If you go to the same prestigious universities every single time and every single year to recruit people ... then you are going to get the same people

over and over again."

Contributing: Paul Overberg

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